82-161

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No._____

IN THE

Supreme Court of the United States

October Term, 1982

THOMAS SHORTBULL,

Petitioner,

v.

STANLEY LOOKING ELK, et al.,

Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

THOMAS SHORTBULL
P.O. Box 548
Pine Ridge, S.D. 57770

PRO SE

QUESTIONS PRESENTED

1. Do Indian citizens have a right to sue tribal officials in their individual capacities under 42 USC. §1985 (3) without these officials being immunized by tribal sovereign immunity under Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

2. Do tribal members who meet all qualifications for membership, but who have not been given a membership number, constitute a "class" under 42 UCS § 1985 (3) for purposes of voting and running for office in tribal elections.

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No_____

IN THE

Supreme Court of the United States

October Term, 1982

THOMAS SHORTBULL

Petitioner,

v.

STANLEY LOOKING ELK, et al,*

Respondents.,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHT CIRCUIT

The petitioner Thomas Shortbull respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on May 3, 1982.

---

*Respondents included:
Stanley Looking Elk, Elijah Whirlwind Horse, James Mousseau, Ivan Bettelyoun, Marvin Amiotte, Gerald (Jump) Big Crow, Lyman Red Cloud, Delores Whitehead, Edgar High Whiteman, Gilbert Matthews, Dave Brewer, and Jerry Matthews.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, together with the unreported February 19, 1981 opinion of the United States District Court for the District of South Dakota, Western Division which it affirmed, appear in Appendices A and B.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on May 3, 1982. This Court's jurisdiction is invoked under 28 U.S.C.§1254 (1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 42:
§1985 (3) Conspiracy to interfer with civil rights.

> If two or more persons in any State or Territory conspire or go in disguise on the highways or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocay in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for

President or Vice President, or an a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do or cause to be done, any act in futherance of this object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

STATEMENT OF THE CASE

This case revolves around the question as to when do Indian people become tribal members. Do Indian people become tribal members when they meet the constitutional requirements of membership, or when they receive a Bureau of Indian Affairs Census number?

Petitioner has always maintained that he became a member of the Oglala Tribe at his birth, but due to the uncertainty of Bureau of Indian Affairs officials as to who qualified under the provisions of the Tribal Constitution, petitioner did not have a Census number when he sought office in the Oglala Sioux Tribal Primary Election.

In order to understand this case, it is necessary to have a historical perspective of tribal membership on the Pine Ridge Reservation.

Prior to 1935, the BIA followed the following procedure in issuing Census numbers based on how reservation land was owned. With those Indian people who were allotted 160 acres or more up until the early 1900's, these tribal members received an A number meaning that they had been allotted land. Those tribal members who were not allotted land received a U number meaning unallotted. Therefore, prior to 1935, those reservation people who were members of the Tribe were those who had A and U numbers.

When the Oglala Tribe was incorporated under the Indian Reorganization in 1935, the Constitution provided for membership as follows:

> Section 1----The membership of the Oglala Sioux Tribe shall consist as follows:
>
> (a) All persons whose names appear on the official census roll of the Oglala Sioux Tribe of the Pine Ridge Reservation as of April 1, 1935.....
>
> (b) All children born to any member of the tribe who is a resident at the time of birth of said children.

With the adoption of the Tribal Constitution, the responsibility of the membership rolls was the Tribe's not the BIA.

However, as the Oglala Sioux Tribe did not provide for its own Enrollment Office until 1979, the BIA continued its own system of Census numbers which the Tribe utilized in lieu of its own system. The Bureau of Indian Affairs without tribal directive decided that the way they would interpret residency for Census purposes would be for all children born on the reservation to receive U numbers which was construed as membership. With those children born off the reservation, they received an NE number with the initials meaning not enrolled. However, the Bureau's position was not that these children were non-enrollees, but rather the classification meant that the children were potentially members of the Tribe but the BIA would not give them U numbers until the Tribe interpreted residency to them.

As the BIA's system of issuing numbers was for Census purposes only, no one had been officially enrolled under Section 1 (b) of the Constitution including those with a U numbers born since 1935 who were however entitled to tribal rights.

As the Tribal Constitution did not state that a parent must physically reside on the reservation, it was petitioner's position that the common law definition of residency should be the yardstick in determining who were members of the Oglala Tribe. Therefore, petitioner maintained that parents who were temporarily away from the reservation still maintained a residency on the reservation and their children were members of the Tribe.

Petitioner was one of the approximately 5,000 members who were classified as NEs, because their birth was off the reservation. Petitioner was born on December 4, 1946, to Norman and Grace Shortbull at Igloo, South Dakota, while they were employed there at the United States Army Depot. Norman Shortbull, the father, had been at all times a duly enrolled member of the Oglala Tribe.

Since 1935, the Oglala Tribe has experienced difficulties in deciding on whether to extend rights to the class of tribal children listed as NEs. The result of this uncertainty led different tribal administrations to allow the NEs the right to vote and run in some tribal elections, or in other elections to be denied such rights. In the 1976 Tribal Election, an NE candidate was allowed to run for the Tribal Vice Presidency. Therefore, even in the 1980 Primary Election, no one knew for sure if the NEs would be allowed the right to run and vote in the election.

In the 1980 Primary Election, petitioner's claim to run and vote in the primary was strengthened by the enactment of Ordinance 79-08 passed in June 1979 which set out the criteria for meeting residency unde Section 1 (b) of the Tribal Constitution. (See Appendix 4a and 5a). Ordinance 79-08 acknowledged that all children born since

1935 including those with U numbers had not been enrolled by the BIA's issuance of Census numbers as the first priority of the Enrollment ordinance was to publish a preliminary list of people with U numbers who would become members if no challenges were filed during the 90 days of review throughout the reservation.

As petitioner's position was that he was vested with a tribal right to enrollment under Ordinance 79-08 as he met the requirements under Section a, d, and e, petitioner submitted his petition for Tribal President on January 9, 1980. Additionally, a Tribal Council meeting on January 9, 1980 passed a motion to allow NEs to vote and run for office in the Primary Election.

However, the Election Board refused to certify petitioner on the grounds that a temporary enrollment committee was a requirement of the January 9th Council meeting as the Tribe had not yet formed a functioning enrollment committee.

Since the overall intent of the January 9th Council meeting was to allow NEs the right to vote and run for office, petitioner filed a writ of mandamus in tribal court on the grounds that the Council action was unclear as to how the NEs could be certified to run and vote in the Primary Election.

After recessing the first tribal court proceeding on January 17, 1980 due to respondents not being represented by counsel, the tribal court was rescheduled to January 21, 1980. A tribal council meeting was held on January 18, 1980 in which the authorization for NEs to vote and run for tribal office was rescinded. The tribal council meeting was scheduled without giving notice to all councilmen, and

councilmen who had voiced support of allowing NEs to vote and run for tribal office at the January 9th council meeting were suspiciously not informed of the Council meeting on January 18, 1980. Thus began the conspiratorial efforts on the part of some of the defendants for this action was illegal as the Tribal Court Code provided that the Tribal Council could not interfere with an issue before the Tribal Court.

After receiving an assurance from respondents in Tribal Court that his job would not be in jeopardy based on whatever ruling he made in petitioner's case, Judge Clyde Red Shirt issued a memorandum opinion that he would issue a temporary injunction unless the matter was reconsidered at a January 24th Council meeting.

At the January 24th Council meeting, a resolution was passed that ordered petitioner to be certified as a candidate for Tribal President in the 1980 Primary Election, and also a resolution was passed allowing NEs to vote in the election. Full discussion took place concerning petitioner and the requirements for tribal membership at the January 24th Council meeting.

On January 29, 1980, a council meeting was held and a motion was passed "To uphold the Constitution and By-Laws of the Oglala Sioux Tribe and support the decisions of the Election Board." No specific motion to rescind the petitioner's authorization to run for office was considered by the tribal council.

On January 30, 1980, a hearing in tribal court was held on the Findings of Fact and Conclusions of Law on Judge Red Shirt's Memorandum Opinion of January 24, 1980. In the hearing, Judge Red Shirt inquired as to what

action was being taken to place petitioner on the primary ballot. Respondents attempted to introduce and assert that the January 29th motion recinded the council order to certify appellant, but Judge Red Shirt ruled against the motion as no specific language for rescission existed in the Janaury 29th motion. From the bench Judge Red Shirt issued his Writ of Mandamus requiring that the Election Board place petitioner on the 1980 Primary ballot, and held he was a member of the Oglala Sioux Tribe based on the full discussion of petitioner's circumstances before the January 24th tribal council meeting. Election Board Chairman acknowledged the Judge's order by responding that the Election Board had no choice but to certify petitioner.

On February 1, 1980, at 10:00 A.M., the Executive Committee advised Judge Red Shirt to rescind his actions that placed petitioner on the Primary ballot or the Tribal Chairman would go for his suspension.

On February 1, 1980, Chief Judge Red Shirt ruled that respondents excluding Delores Whitehead were in contempt of court for failing to place petitioner on the Tribal ballot. With contempt proceedings facing the tribal officials, they suspended Judge Red Shirt and replaced him with Delores Whitehead. Judge Whitehead quashed Judge Red Shirt's orders, and petitioner was unable to run for Tribal President on February 5, 1980. Judge Red

Shirt's suspension was illegal for the Tribal Court Code provided that a hearing must be given to a suspended judge to answer charges, and there must exist just cause to suspend a tribal judge. No hearing or formal charges were presented against Judge Red Shirt prior to his suspension. Judge Red Shirt was eventually fired by the Tribal Council for making what they thought was an unconstitutional decision.

On March 17, 1980 petitioner brought a civil action against respondencts under 42 U.S.C. § 1985 (3). Petitioner sought damages incurred in his attempt to run for tribal office by the illegal conspiratorial efforts of respondents in denying him the right to run for office. This cause of action was allowable under the federal statute, because petitioner was denied the right to run for office based on his membership in a class who were invidiously discriminated against by the BIA's unconstitutional denial of a Census number when he met all qualifications of tribal membership.

On February 19, 1981, District Judge Andrew Bogue ruled for respondents motion to dismiss for summary judgment pursuant to Rule 12 (b) of the Federal Rules of Civil Procedure. The District Court ruled that petitioner's political opposition to the respondents was not class based, and that the NEs were not an invidious discriminatory classification, because under Santa Clara Pueblo v Martinez, 436 U.S. 49, 72 N 32, 98 S. Ct. 1670, 56 L. Ed. 2d 101 (1978), the Indian tribes have a right to determine its own membership.

Although the Appeals Court noted that petitioner had no remedy within the tribal machinery, the Eighth Circuit Court of Appeals on May 3, 1982 affirmed the decision of

the District Court by holding that petitioner did not meet the class based invidious discriminatory animus as required in Griffin v Breckenridge, 403 U.S. 88, 91 S. Ct. 1790, 29 L. Ed. 2d 338 (1971).

REASONS FOR GRANTING THE WRIT

1. TRIBAL MEMBERS WHO HAVE BEEN UNCONSTITUTIONALLY DENIED A MEMBERSHIP NUMBER CONSTITUTE A CLASS UNDER 42 U.S.C. 1985 (3)

The right of tribal members to utilize 42 U.S.C. 1985 (3) was affirmed in the case of Means v Wilson, 522 F. 2d 833 (8th Cir.), cert. denied, 424 U. S. 958, 96 S. Ct. 1436, 47 L. Ed. 2d 364 (1975). A cause of action in Means was met under the requirement of a class based animus, because "defendents conspired and did overt acts in futherance of a conspiracy to deprive the plaintiff of their right to vote because they were supporters of plaintiff Means and members of the American Indian Movement." Id. at 839. The Eighth Circuit held that "(t)he group of plaintiffs in this case, by their affirmative acts of supporting plaintiff Means and the American Indian Movement and attempting to oust Wilson as their Council President, were a class against who, according to the allegations of their complaint, the defendants discriminated against because of their class membership." Id. at 840 (footnote omitted)

In Griffin v Brekenridge, 403 U.S. 88, 91 S. Ct. 1790, 29 L. Ed. 2d 338 (1971), the Supreme Court established the following four basic elements necessary to state a cause of action under 42 U.S.C. 1985 (3): (1) a conspiracy, (2) for the purpose of depriving any persons or class of per-

sons of the equal protection of the laws, (3) an act in furtherance of the conspiracy, and (4) resulting injury or the deprivation of any right or priviledge of a citizen of the United States. Id. at 102-103.

In this case, the District Court held that a factual issue was raised within elements 1, 3, and 4 of the Griffin Test. However, in regard to element 2 of the Griffin Test, there was no conceivable set of facts which could support a recovery for petitioner for no class based animus existed as the tribe had the right to determine its own membership.

The first question to be answered in this writ is whether the classification of NEs on the Pine Ridge Reservation constitute a class under 42 U.S.C. 1985(3), and this must be answered in the affirmative for these reasons.

First, the NE classification constituted a class who were invidiously discriminated for they were a class who were members of the Oglala Tribe, but because the Bureau of Indian Affairs had not given these people Census numbers, they were denied the rights that their membership entailed such as the right to vote and run for office.

Petitioner understands the reluctance of the District Court and the Eighth Circuit Court of Appeals to find that the NEs constitute a class where there is no official certification of membership in light of Santa Clara Pueblo v Martinez. 436 U.S. 49 (1978). However, what petitioner has alleged for himself and other NEs that they always met the requirements of membership has recently been confirmed by the issuance of a U number to petitioner on June 28, 1982 by the Tribal Enrollment Committee. (See Appendix 1c). Other NEs have also recently been issued U

numbers by the Enrollment Committee. The Enrollment Committee has continued the BIA practice of issuing U numbers.

If in fact the NEs were not members of the Tribe, it would have required a constitutional amendment to the Tribal Constitution to allow for their membership. However, it was only a tribal ordinance passed in June 1979 that clarified the residency requirement that has now allowed the tribal members who were listed with an NE number to now have U numbers. The sad fact is that the NEs were denied tribal membership rights, because of the bureaucratic incompetency of the Bureau of Indian Affairs Census Office who arbitrarily and capriously gave NE classifications because they did not know if residency extended to those children born off the reservation.

Petitioner would inquire as to when a citizen becomes a United States citizen, and the answer is that he becomes a citizen at his birth when meeting the requirements of the U.S. Constitution. Likewise with petitioner, his membership began with his birth for he met the constitutional requirements of tribal membership.

Additionally, the fact that the NEs were allowed on some occassions to run and vote in tribal election and other elections were denied shows the invidious discriminatory animus towards the NE class.

Secondly, even if at the time of the 1980 Primary Election, it could be argued that petitioner was not entitled to run as he did not have a U number, the action of the Tribal Council on January 24th to allow petitioner to run for Tribal President and NEs to vote in the Tribal Election made them legal participants in the election process. The

Tribal Council allowed for the participation of NEs in this election, because the Tribal Constitution does not provide that people have U numbers, but only that they be members of the tribe. In essence, the Tribal Council concluded that the NEs met the constitutional requirements of membership.

Respondents will argue that the January 24th Tribal Council action was rescinded by a motion adopted by the Council on January 29, 1980 which provided for "the Tribal Council body to uphold the Constitution and By-Laws and Election Ordinance, and also uphold the decisions of the Election Board." The Chief Judge of the Tribal Court when faced with this issue held the motion had no effect as no specific language for rescission existed in the January 29th motion. Federal Courts without exception require that the members of the tribe must abide by the Tribal Constitution and Ordinances. Williams v. Sisseton - Wahpeton Sioux Tribal Council, 387 F. Supp. 1194. It is stated federal policy that intra-tribal controversies must be governed by adhering to tribal laws that have been passed by Tribal Councils. Keith, et al. v Oglala Sioux Tribe, et al, Civ. No. 76-5004 (D.S.D. April 30, 1976). Also, see Rosebud Sioux Tribe v. Driving Hawk, 407 F. Supp. 1197 (D.S.D. 1976) for a further discussion of this rule. The petitioner would only ask the Court to imagine how many federal laws would be left standing if such vague language were used in repealing federal laws.

The invidious discriminatory animus in this case lies with the circumstances that you had two classes on the Pine Ridge Reservation with one class having U numbers and enjoying tribal rights based on that classification even though Ordinance 79-08 held that those children born since 1935 with U numbers had not been officially enrolled

and they must be enrolled under the ordinance. However, the other class who were also members of the Tribe and were entitled to participation based on the January 24th Council action were denied the rights to run for office and vote in the election because they been incorrectly been given the classification of NEs by BIA officials. Although the NEs and petitioner were entitled to legal participation in the 1980 Primary Election, petitioner was denied such rights based on his membership in the NE class as this was the justification given to petitioner by the Election Board for not placing his name on the Ballot. Surely, this is the type of case that was envisioned by the enactment of 42 U.S.C.§ 1985 (3).

The Eighth Circuit and the District Court have erred in viewing the statement in the complaint "and his political opposition to said defendents" as a basis for meeting the requirements of the class based animus. (See Appendix 9a). This statement was included in the amended complaint from the one that was filed on February 11, 1980 against the March 11, 1980 Tribal General Election. In denying the temporary injunction, Judge Donald J. Porter of the Central Division of the District of South Dakota held that the complaint must state that the illegal acts were carried out in furtherance of their cause. See Indian Political Action Committee v. Tribal Executive Committee, 416 F. Supp. 655 (D. Minnesota 1976). Although there is no way to know for sure, it is conseivable that petitioner would have received some of the NEs votes if they were allowed to vote in the 1980 Primary Election. Petitioner would have received some of the NE votes for he had fought for their right to vote before the Tribal Council. Therefore, the statement in the complaint as to petitioner's political opposition to defendents was not a statement for a basis of meeting the class based animus, but

rather was to show how the respondents acted in furtherance of their own cause.

The fault with this case may lie in a better prepared complaint. However, in Means v. Wilson. 522 F. 2d 833, the Eighth Circuit held "the complaint sufficiently alledges all of these facts in one way or another no matter how inartfully done and states a claim under 42 U.S.C. 1985 (3).

Petitioner maintains that the Eighth Circuit erred in affirming the District Court's issuance of a summary judgment in this case. Clearly, enough questions have been raised in this writ that petitioner meets the requirement of a class based animus under 42 U.S.C. 1985 (3), and a trial jury should have been allowed to decide the issues in this case without summary judgment being issued.

2. TRIBAL OFFICIALS SHOULD NOT BE IMMUNE FROM CIVIL ACTION IN THEIR INDIVIDUAL CAPACITIES BY TRIBAL SOVEREIGN IMMUNITY GAINED FROM SANTA CLARA PUEBLO V. MARTINEZ, 436 U.S. 49 (1978)

In the Martinez decision, the Supreme Court held that declaratory and injunctive relief by the federal courts would not be available to tribal members for violations of civil rights under Title 1 of the Indian Civil Rights of 1968 (ICRA) 25 U.S.C. § 1301-1303 (1970). The Supreme Court reasoned that allowing Indian citizens the right of federal court relief was counter to Congress's goal of protecting the internal sovereignty of Indian tribes. The Supreme Court in Martinez stated, "creation of the Federal cause of action for the enforcement in Title I, however useful it might be in securing compliance with §

1302, plainly would be at odds with the Congressional goal of protecting tribal self-government", 436 U.S 49, 64.

Petitioner does not intend to argue against the ruling in the Martinez decision, but rather brings this writ on language in Martinez that suggests that tribal officials are not immune from civil actions in their individual capacities. As the Court observed in Martinez:

"As an officer of the Pueblo, petitioner Lucario Padilla is not protected by the tribe's immunity from suit. See Puyallup Tribe, Inc. v. Washington Department of Game, 433 U.S. at 171-172; Compare Ex Parte Young, 209 U.S. 123 (1908).

This clearly supports the proposition that tribal officials can be sued in their individual capacities under 42 U.S.C. 1985 (3).

Petitioner understands the Supreme Court's desire to protect internal sovereignty by allowing tribal forums to be developed and stregthened to resolve tribal civil rights violations. However, in this case, the Martinez decision did not produce the hoped for forum for relief of civil rights violations. In fact, the respondents manipulated their own tribal court system to their own advantage so as to deny petitioner the right to run for Tribal President in the 1980 Tribal Election, and gained for themselves a political advantage in the election.

When a Chief Judge of an Indian Tribe can be suspended and eventually fired for making a decision that was contrary to the wishes of tribal officials, then there exists no forum for a resolution of petitioner's civil rights violation. The concern for no remedy of civil rights viola-

tions was expressed by the Eighth Circuit in petitioner's case:

> We are thus presented with a situation in which Shortbull has no remedy within the tribal machinery nor with the tribal officals in whose election he cannot participate, compare Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes 623 F. 2d 682, 685 (10th Cir. 1980), cert; denied, 449 UY.S. 1118, 101 S. Ct. 931, 66 L. Ed. 2d 847 (1981), unless and until Congress provides otherwise. See Santa Clara Pueblo v. Martinez, 436 U.S. at 72. We question whether such a result is justified on the ground of maintaining tribal autonomy and self-government: it frustrates the ICRA's purpose of "protecting individual Indian from arbitrary and unjust action of tribal government, "and in this case it renders the rights provided by the ICRA meaningless. Id. at 73, 83 (citations omitted) (J. White, dissenting).

Additionally, respondent have argues in their briefs to the District Court and the Eighth Circuit Court of Appeals that petitioner had not exhausted his rememdies through the Tribal Court process. However, when the respondents are allowed to replace the suspended Chief Judge with their own choice for Chief Judge and when two of the respondents also sit on the Tribal Appellate Court, it is ludicrous to believe that justice could be served through such a system.

A similar case as petitioner is presenting in this writ was considered by the Tenth Circuit in Dry Creek Lodge, Inc. v Arapahoe & Shoshone Tribes, 623 F. 2d 682, (10th

Circuit, 1980), cert. denied, 449 U.S. 1118, 101 S. Ct. 931, 66 L. Ed. 2d 847 (1981). The Tenth Circuit held that were no tribal forum for relief existed for non-Indian litigants, that the federal court system would be available to them. Surely, petitioner should be entitled to the same relief given to non-Indians in Dry Creek.

Petitioner seeks in this case for tribal officials to not be allowed to operate above the law for when on January 24, 1980, the Tribal Council certified petitioner as a candidate for Tribal President, the law of the Oglala Tribe was that petitioner was a candidate for Tribal President and NEs could vote in the election. This case is in accordance with Martinez for it seeks to have tribal officials follow their own laws as mandated in the January 24th Council action, and to prevent individuals from being immuned from judicial review in their individual capacitiies through illegal conspiracies as found in 42 U.S.C. 1985 (3). To hold otherwise, would be to say that unscrupulous individuals can with impunity subvert their own tribal court process for purely political reasons and place the Federal Government in a position to aid and abet in the denial of Constitutional rights to one of its citizens.

As petitioner has previously stated, he is not in opposition to the ruling in Martinez. However, the Supreme Court must be aware that in this country only a very few Indian tribes provide for a separation of powers for its judicial branch. Therefore, most Chief Judges owe their allegiance to the Tribal officials who appoint them, and can be removed at the whim of these officals. There then exists the potential for individual civil rights to be violated with no forum for relief at the tribal level.

Petitioner is not asking that tribal members have the right of declaratory and injunctive relief for violations of the Indian Civil Rights Act. However, petitioner humbly prays that where tribal officials have placed themselves above the law and lost the protection of their official position through illegal conspiracies that they be subject to federal court review under 42 U.S.C. §1985 (3).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,
THOMAS SHORTBULL
P.O. Box 548
Pine Ridge, S.D. 57770
PRO SE

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 81-1280

Thomas Shortbull,	*	
Appellant,	*	
v.	*	Appeal from the United States District Court of South Dakota.
Stanley Looking Elk, Elijah Whirlwind Horse, James Mousseau, Ivan Bettelyoun, Marvin Amiotte, Gerald "Jump" Big Crow, Lyman Red Cloud, Delores Whitehead, Edgar High Whiteman, Gilbert Mathews, Dave Brewer, and Jerry Matthews	*	
Appellees.'	*	

Submitted: December 16, 1981

Filed: May 3, 1982

Before BRIGHT and ROSS, Circuit Judges, and LARSON, Senior District Judge.*

Thomas Shortbull brings this appeal challenging the district court's order granting summary judgment against him. We affirm.

The facts are set out fully in the district court's memorandum opinion. See Thomas Shortbull v. Stanley Looking Elk, et al., No. 80-5035 (D. S.D., filed February 19, 1981). Appellant Thomas Shortbull is a non-enrolled member of the Oglala Sioux Tribe.

A member of the Tribe is defined in the Tribal Constitution as follows:

> Section 1 -- The membership of the Oglala Sioux Tribe shall consist as follows:
>
> (a) All persons whose names appear on the official census roll of the Oglala Sioux Tribe of the Pine Ridge Reservation as of April 1, 1935, provided, that correction may be made in said rolls within five years from the adoption and approval of this constitution by the tribal council subject to the approval of the Secretary of Interior.
>
> (b) All children born to any member of the tribe who is a resident of the reservation at the time of the birth of said children.
>
> Section 2 -- The tribal council shall propose bylaws covering future membership and the adoption of new members.

---

*Earl R. Larson, United States Senior District Judge, District of Minnesota, sitting by designation.

An enrolled member is a person on the 1935 census roll of the Pine Ridge Reservation or the child of any tribe member who was a resident of the reservation at the time of the child's birth. Shortbull is a non-enrolled member, or N.E., because although his father is a member of the Tribe, Shortbull was born off the reservation in Igloo, South Dakota, where his father was employed.

The controversy involved in the present suit arose when Shortbull filed nominating petitions to have his name placed on the ballot for the January 1980 primary election for the office of President of the Oglala Sioux Tribe on the Pine Ridge Reservation. Shortbull's nominating petitions were rejected by the Tribal Election Board because the tribal ordinances required that the President be an enrolled member. Shortbull then sought permission to run in the primary election from the Tribal Council. On January 24, the Council enacted Tribal Resolution 80-12, which provided:

> BE IT RESOLVED that the Oglala Sioux Tribal Election Board is hereby directed and authorized to forthwith accept the petition of Thomas Shortbull to run for Tribal President and certify him as a candidate in the upcoming election.

The resolution indicated that the Tribe had experienced difficulty in providing a procedure whereby memberships in the Tribe could be processed, and had enacted ordinances providing for enrollment that had not been implemented[1]. On January 29, the Council passed a subse-

---

[1]Tribal Ordinance 79-08 established the following procedures for enrolling tribal members born since 1935:

quent resolution that stated: "Tribal Council body to uphold the Constitution and By-laws and Election Ordinance, and also uphold any decisions of the Election Board." Appellees asserted that this January 29 resolution rescinded Resolution 80-12, but on January 30 Chief Tribal Court Judge H. Clyde Red Shirt disagreed, and ordered the Election Board to certify Shortbull as a candidate and place his name on the ballot pursuant to the Council's January 24 resolution.

Footnote 1 continued

> Section 201. Publication of Preliminary List. The Department of Enrollment shall at the earliest possible opportunity publish a preliminary list of all enrolled members of the Oglala Sioux Tribe, listing names, date of birth, and degree of tribal ancestry. A copy of that list shall be available for inspection at the office of the Oglala Sioux Tribe during regular business hours and at such other conspicuous [sic] public places throughout the Pine Ridge Indian Reservation as the Department of Enrollment may direct.
>
> Section 202. Claims for Enrollment. (a) Any person born prior to the date of publication of the preliminary list of enrolled members who does not appear on the list and for whom a claim for enrollment is made, may apply for enrollment to the Department of Enrollment, either in person, in in the case of a minor or a person non compos mentis through a parent, guardian, or next friend. Such application shall be made on such form as the Department shall prescribe and shall be filed within six months of the date of publication of the preliminary list.
>
> (b) The names of all applicants for enrollment under subsection (b) shall be posted on the public bulletin board of the Oglala Sioux Tribe and at such other conspicuous public places through the Pine Ridge Indian Reservation as the Department of Enrollment may direct, for at least

Footnote 1 continued

fourteen days before any application may be acted on by the Department.

Residency Requirements: (a) A person who leaves the Resevation for service in the armed forces of the United States or for any other employement with the United States Government or for attendance at an educational institution shall be considered to be a resident of the reservation for as long as such service, employment or attendance continues and for an additional six months.

(b) A person who left the reservation for the purpose of employement during the period December 7, 1941 through August 14 , 1945, and returned to reside on the reservation on or before December 31, 1945, shall be considered to be a resident of the reservation during the period of such absence.

(c) A person who resided within the former Pine Ridge Aerial Gunnery Range and left the reservation following or in anticipation of the taking of the Gunnery Range by the United States Government, and returned to reside on the Reservation on or before December 31, 1945, shall be considered a resident of the reservation during such absence.

(d) A person who leaves the reservation for the purpose of employement shall be considered a resident of the reservation during such absence if: (1) he or she continues to own an interest (legal or beneficial) in land within the reservation, or (2) he or she returns to reside on the reservation within five years.

(e) A person who leaves the reservation and thereby ceases to be a resident shall be considered to have reestablished residence on the reservation if such person maintains his or her permanent residence on the reservation for a period of one year.

This ordinance has not been implemented, but Shortbull's attorney argued to the Tribal Council that Shortbull met the residency requirements of provisions (a), (d) and (e) of the ordinance.

Footnote 1 continued

The January 24 resolution (Resolution 80-12) provided in full:

RESOLUTION DIRECTING THE OGLALA SIOUX TRIBAL ELECTION BOARD TO CERTIFY THOMAS SHORTBULL AS A CANDIDATE FOR TRIBAL PRESIDENT.

WHEREAS, the Oglala Sioux Tribe has experienced considerable difficulty in providing for a procedure to process applications for membership in the Tribe and nothing definitive about such procedure has been accomplished for a great many years, and

WHEREAS, certain ordinances passed by the Tribe governing enrollment have not been implemented in time for various persons to vote and run for Tribal Office, and

WHEREAS, previously, non-enrolled members of the Tribe have been frustrated in their attempts to participate in Tribal Government to the full extent even though they were entitled to membership by [sic] have been unable to vote or run for office, with few expections [sic], and

WHEREAS, Thomas Shortbull, who is registered as N.E. presented his sufficient petitions to run for Tribal President to the Tribal Election Board prior to the deadline on January 9, 1980 and even though he also presented his documentation to said Board, it has refused to act on these petitions and to certify him as a candidate in the upcoming election, and

WHEREAS, time is of the essence and unless the Council takes action to certify him as a candidate, he will be prevented from running in the upcoming election, now

THEREFORE, BE IT RESOLVED that the Oglala Sioux Tribal Election Board is hereby directed and authorized to forthwith accept the petition of Thomas Shortbull to run the Tribal President and certify him as a candidate in the upcoming election.

On February 1, Chief Judge Red Shirt held certain tribal officials in contempt for failing to place Shortbull's name on the ballot, but because of this action, the Tribal Executive Committee suspended Judge Red Shirt[2] and replaced him with Judge Whitehead. Judge Whitehead quashed Judge Red Shirt's orders, and the Election Board notified Shortbull that he was not eligible to run for Tribal President. On February 4, Judge Red Shirt ruled that he was still Chief Judge and had arrest warrants issued for those persons he had held in contempt of court on February 1. He also ordered the postponement of the February 5 primary election. Judge Whitehead immediately quashed the arrest warrants and ordered that the February 1 contempt citations be purged from the records. The primary election was held February 5, and Shortbull did not participate as a candidate.

On March 17, 1980, Shortbull brought the present action in Federal court under 42 U.S.C. § 1985 (c)[3] against defendents Judge Whitehead, the Tribal President, two tribal attorneys, and various other tribal officials, including the members of the Tribal Election Board and the members of the Tribal Executive Committee. In his complaint Shortbull alleged that these individuals conspired to deprive him of his right--as determined by Judge Red Shirt and the Tribal Council resolution--to have his name placed on the ballot for the primary election. District Judge Andrew Bogue ruled against the appellees' motion to dismiss

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[2]Shortbull alleged that this suspension was illegal since Judge Red Shirt was not given a hearing and the Executive Committee gave no reasons for the suspension, although just cause is required by tribal ordinance.

and against Shortbull's motion to disqualify appellees' attorney, but after presenting the district court with Shortbull's deposition and accompanying exhibits, the appellees renewed their motion to dismiss and asked the district court to consider it a motion for summary judgement pursuant to Rule 12 (b) of the Federal Rules of Civil Procedure. On February 19, 1981, the district court granted appellees' motion, and Shortbull has appealed.

In reviewing Judge Bogue's decision to grant summary judgment, we apply the same standard as the district court. Summary judgment may only be granted if there is no genuine issue of material fact: there may be no controversy that the appellees in this case have established their right to judgment. Summary judgment may not be granted if appellant Shortbull is entitled to recover under any circumstances, and the facts must be viewed in the light most favorable to him. See Vette Co. v. Aetna

[3]42 U.S.C. § 1985 (c) was codified as § 1985 (3) prior to 1976. This statute provides in part:

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws . . . in any case of conspiracy set forth in this section , if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

Casualty & Surety Co., 612 F. 2d 1076, 1077 (8th Cir. 1980); Penne v. Greater Minneapolis Area Board of Realtors, 604 F. 2d 1143, 1148 (8th Cir. 1979); Butler v. MFA Life Insurance Co., 591 F. 2d 448, 451 (8th Cir. 1979).

In Griffin v. Breckenridge, 403 U.S. 88, 91 S. Ct. 1790, 29 L. Ed. 2d 338 (1971), the Supreme Court set forth the four basic elements necessary to state a cause of action under 42 U.S.C. § 1985 (c): (1) a conspiracy, (2) for the purpose of depriving any person or class of persons of the equal protection of the laws, (3) an act in furtherance of the conspiracy, and (4) resulting injury or the deprivation of any right or privilege of a citizen of the United States. Id. at 102-03. The Court in Griffin indicated that the second requirement "means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." Id. at 102 (footnote omitted). In granting summary judgment the district court found that Shortbull had raised a factual issue as to the first, third, and fourth requirements established by Griffin, but determined that there was no conceivable set of facts that could support recovery as to the second element of the Griffen test. Shortbull's complaint in this regard alleged:

> Defendants' actions were motivated by an invidious discriminatory animus towards plaintiff, because of his membership in the class of people classified as "N.E." on the official B.I.A. Census rolls and his political opposition to said defendants.

The district court held that Shortbull's claim that he was discriminated against because of his individual political opposition to the appellees was not a class-based claim,

and his claim that he was discriminated against because of his status as an N.E. was not actionable under § 1985 (c) because the criteria defining the N.E. class were not invidious.

In Griffin, the Supreme Court ruled that a racially discriminatory conspiracy was actionable, see Griffin v. Breckenridge, 403 U.S. at 102 n. 9, 103, and the Court has implicitly held that discrimination on the basis of sex is sufficient under the statute, see Great American Federal Savings & Loan Ass'n v. Novotny, 442 U.S. 366, 389 n. 6, 99 S. Ct. 2345, 60 L. Ed. 2d 957 (1979), but beyond these two cases, there is significant confusion over what classes are protected under § 1985 (c). See Note, The Class-Based Animus of 42 U.S.C. § 1985 (c): A Suggested Approach, 64 Minn. L. Rev. 635, 642-44 (1980). Most courts have extended protection to other suspect-like classes, such as those based on religion, see, e.g., Ward v. Connor, 657 F. 2d 45 (4th Cir. 1981) (appeal pending); Marlowe v. Fisher Body, 489 F. 2d 1057 (6th Cir. 1973); Action v. Gannon, 450 F. 2d 1227 (8th Cir. 1971); Baer v. Baer, 45] F. Supp. 481 (N.D. Cal. 1978), or those defined by ideology or the exercise of a fundamental right. See, e.g., Philadelphia Yearly Meeting of the Religious Society of Friends v. Tate, 519 F. 2d 1335 (3d Cir. 1975); Glasson v. City of Louisville, 518 F. 2d 899 (6th Cir.), cert. denied, 423 U.S. 930 96 S. Ct. 280, 46 L. Ed. 2d 258 (1975); Cameron v. Brock, 473 F. 2d 608 (6th Cir. 1973); Puentes v. Sullivan, 425 F. Supp. 249 (W.D. Tex. 1977). The ultimate test, of course, is whether the classification is sufficiently "invidious" so as to fall within the statute's ambit. See Harrison v. Brooks, 519 F. 2d 1358, 1359-60 (1st Cir. 1975).

In Means v. Wilson, 522 F. 2d 833 (8th Cir.), cert. denied, 424 U.S. 958, 96 S. Ct. 1436, 47 L. Ed. 2d 364

(1975), this Court was confronted with another § 1985 (c) complaint arising from an election dispute on the Pine Ridge Reservation. In Means, we reversed the dismissal of the complaint filed by Russell Means, an unsuccessful candidate for President of the Oglala Sioux Tribe, and a group of his political supporters. All of the plaintiffs in Means were enrolled members of the Tribe, and we found that their complaint alleged a cause of action under § 1985 (c) because it stated that "defendants conspired and did overt acts in furtherance of a conspiracy to deprive the plaintiffs of their right to vote because they were supporters of plaintiff Means and members of the American Indian Movement." Id. at 839. We held that "[t]he group of plaintiffs in this case, by their affirmative acts of supporting plaintiff Means and the American Indian Movement and attempting to oust Wilson as their Council President, were a class against whom, according to the allegations of their complaint, the defendants discriminated against because of their class membership." Id. at 840 (footnote omitted).

We agree with the district court's assessment that Shortbull's allegations are distinguishable from those made by the plaintiffs in Means. Shortbull's suggestion that he was discriminated against because of "his political opposition to said defendants" does not apper to raise a class-based claim. The term class-based animus does not include personal animus, see Duff v. Sherlock, 432 F. Supp. 423, 429 (E.D. Pa. 1977) and cases cited therein, and Shortbull's allegation that appellees discriminated against him because of his individual political opposition to them is not actionable under § 1985 (c). See Lessman v. McCormick, 591 F. 2d 605, 608 (10th Cir. 1979) (no animus against anyone other than individual plaintiff debtor); McNally v. Pulitzer Publishing Co., 532 F. 2d 69, 75

(8th Cir.), cert. denied, 429 U.S. 855, 97 S. Ct. 150, 50 L. Ed. 2d 131 (1976) (citing McLellan v. Mississippi Power & Light Co., 526 F. 2d 870, 878 (5th Cir. 1976), aff'd in part, vacated in part, 545 F. 2d 919 (5th Cir. 1977); Carchman v. Korman Corp., 456 F. Supp. 730, 734 (E.D. Pa. 1978), cert. denied, 444 U.S. 898, 100 S. Ct. 205, 62 L. Ed. 2d 133 (1979) ("there must be a discriminatory animus toward a class, not toward an individual qua individual"). Indeed, Shortbull does not appear to question this determination on appeal.

The class-based claim that Shortbull urges on appeal is that he was discriminated against because of his status as a non-enrolled member of the Tribe. He asserts that he is being denied the right to run and vote in tribal elections solely because of his membership in the class of N.E.s, and that such discrimination is impermissible and actionable under § 1985 (c). We must disagree. The Oglala Sioux have an important interest in setting the standards for who may vote and run in tribal elections. In Daly v. United States, 483 F. 2d 700 (8th Cir. 1973), this Court held that the Crow Creek Sioux Tribe could iniformly require the Tribal Council members be one-half or more Indian blood, because "the Tribe has a sufficient cultural interest in setting a higher blood quantum requirement to hold office than for mere membership in the Tribe if it so desires." Id. at 705-06 (footnote omitted). The Court viewed such a standard as similar to the one contained in the United States Constitution that the President of the United States be a natural born citizen. See id. at 706 n. 4. Moreover, "[a] tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community." Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 n. 32, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978). The right to define who

is eligible to run for office and vote in elections must be viewed in a similar manner. The policy of promoting Indian self-government, see, e.g., id. at 62, thus suggests that requiring presidential candidates to be enrolled members of the Tribe is a legitimate political determination that does not create an invidiously discriminatory classification. Because Shortbull has failed to demonstrate that the exclusion of non-enrolled members of the Tribe as a class is invidously discriminatory, the district court's grant of summary judgment must be affirmed.

We must, however, express serious concern that Shortbull's rights under § 1302 of the Indian Civil Rights Act (ICRA) [4] may never be vindicated. Shortbull alleges that the tribal court, Chief Judge Red Shirt, ruled that he was entitled to run in the primary election because of the Tribal Council's January 24 resolution. It appears that because of this ruling, Judge Red Shirt was removed from office and was replaced by a judge more sympathetic to the Tribal Executive Committee, who quashed Judge Red Shirt's orders. Such actions raise serious questions under the Indian Civil Rights Act, but because the Supreme Court determined in Martinez that there is no private right

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[4] Section 8 of the Indian Civil Rights Act provides as follows:

> 25 U.S.C. ' 1302. Constitutional Rights.
>
> No Indian tribe in exercising powers of self-government shall--
>
> • • •
>
> (8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law.

of action under the ICRA, Shortbull has no rememdy. Indeed, were we to find that he had alleged sufficient class-based animus to come within the ambit of § 1985 (c), we would have to confront the question of the source of Federal power to reach the private conspiracy under § 1985 (c). There is no question that the Martinez decision affects such a determination. See Means v. Wilson, 522 F. 2d at 838-39.

We are thus presented with a situation in which Shortbull has no remedy within the tribal machinery nor with the tribal officials in whose election he cannot participate, compare Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes, 623 F. 2d 682, 685 (10th Cir. 1980), cert. denied, 449 U.S. 1118, 101 S. Ct. 931, 66 L. Ed. 2d 847 (1981), unless and until Congress provides otherwise. See Santa Clara Pueblo v. Martinez, 436 U.S. at 72. We question whether such a result is justified on the grounds of maintaining tribal autonomy and self-government: it frustrates the ICRA's purpose of "protect[ing] individual Indians From arbitrary and unjust actions of tribal governments," and in this case it renders the rights provided by the ICRA meaningless. Id. at 73, 83 (citations omitted) (J. White, dissenting).

Because we find that the district court was correct in its determination that the appellees' actions in preventing Shortbull from running for office because he was a non-enrolled member of the Tribe were not motivated by an invidiously discriminatory animus as required by § 1985 (c), we need not reach the questions of whether Shortbull failed to exhaust his administrative remedies or whether appellees' attorney should have been disqualified. The judgment of the district court is accordingly, affirmed.

A true copy.

attest:

CLERK, U.S. COURT OF APPEALS, EIGHT CIRCUIT.

APPENDIX

United States District Court

District of South Dakota

February 19, 1981

Mr. Ramon Roubideaux
Attorney at Law
P.O. Bos 277
Rapid City, South Dakota 57709

Mr. Dennis Hill
Attorney at Law
P.O. Box 290
Rapid City, South Dakota 57709

Re: Thomas Shortbull vs. Stanley Looking Elk, Elijah Whirlwind Horse, James Mousseau, Ivan Bettelyoun, Marvin Amiotte, Gerald "Jump" Big Crow, Lyman Red Cloud, Delores Whitehead, Edgar High Whiteman, Gilbert Matthews, Dave Brewer, and Jerry Matthews - CIV80-5035

Gentlemen: MEMORANDUM OPINION

This suit is brought under 42 U.S.C. § 1985 (3)[1]. It is presently before this Court on a motion for summary judgment made by the Defendants.

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[1]If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another for the purpose

The case arises out of a dispute concerning the primary and general elections for the office of Tribal President of the Oglala Sioux Tribe. Plaintiff charges that a conspiracy on the part of the Defendants in violation of 42 U.S.C. § 1985 (3) led to his name not being placed on the ballot for the primary election. To fully understand Plaintiff's allegations it is necessary to trace the facts leading upto the tribal elections.

On January 9, 1980, Plaintiff Thomas Shortbull filed his nominating petitions for the office of Tribal President. Even though Plaintiff's petitions apparently contained a sufficient number of names to meet the tribe's requirements for a presidential candidate, the tribal election board failed to take any action in regard to Plaintiff;s nominating petitions after receipt of them. The reason for

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Footnote 1 continued

of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

the board's refusal to certify Plaintiff as a candidate was that he is not an enrolled member of the Oglala Sioux Tribe[2]. After several tribal meetings and pleas by Plaintiff that he be certified as a candidate, on January 24, 1980, the Tribal Council adopted a resolution directing the tribal election board to certify Plaintiff as a candidate for the upcoming tribal election. However, on January 29, 1980, a resolution was adopted by the Tribal Council which provided for the "Tribal Council body to uphold the Constitution and By-laws and Election Ordinance, and also uphold any decision of the Election Board."

On January 30, 1980, H. Clyde Red Shirt, chief judge of the Tribal Court, ordered the Election Board to certify Plaintiff as a candidate and place his name on the February 5 primary election ballot. On February 1, 1980, Red Shirt held several tribal officials in contempt for failure to implement his order regarding the placement of Plaintiff's name on the ballot. He ordered these officials arrested. On this same day, the Tribal Council removed Judge Red Shirt from office and Judge Delores Whitehead quashed his previous orders. Furthermore, the Oglala Sioux Tribal Appeals Court stayed execution of Red Shirt's orders of February 1, 1980. Also on February 1, 1980, the election board notified Plaintiff that he was not eligible to run for tribal president because he was listed on tribal records as an N.E.

On February 4, 1980, Red Shirt ruled that he was still Chief Judge and had arrest warrents reissued for those persons he had held in contempt of court. He also ordered postponement of the February 5 primary election. On this

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[2]Plaintiff is registered in the tribal records as a non-enrolled member. Such a person is commonly referred to as an N.E.

same day, Judge Whitehead quashed Red Shirt's contempt citations of February 1 be purged. The primary election was held on February 5 as scheduled without Plaintiff's name on the ballot.

Plaintiff subsequently filed a suit in this Court on February 11, 1980. That suit, which named various tribal officials as defendants, was brought under 42 U.S.C. § 1985 (3) and 42 U.S.C. § 1983. In it, Plaintiff asked for damages and for this Court to declare the acts of the Defendants unlawful and to enjoin Defendants from taking such action in the future. Plaintiff subsequently filed a motion for a temporary restraining order attempting to enjoin the tribal general election which was scheduled for March 11, 1980.

On March 7, 1980, the Honorable Donald J. Porter denied Plaintiff's motion for a temporary restraining order and dismissed Plaintiff's complaint[3]. Judge Porter's dismissal of the complaint in the earlier case was primarily based on two factors. First, Plaintiff had failed to allege that the Defendant's alleged illegal acts were carried out in order to further their own cause. See Indian Political Action Committee v. Tribal Executive Committee, 416 F. Supp. 655 (D. Minn. 1976). Secondly, the complaint was dismissed because Plaintiff had failed to show he had exhausted his tribal remedies.

Plaintiff filed the complaint in the instant action on March 17, 1980. This action names as defendants Judge Whitehead, the tribal president, the members of the tribal

[3]Although the earlier case was filed with this Court, due to scheduling difficulties, the matter was transferred to the Central Division of the District of South Dakota.

election board, the members of the tribal executive committee, two tribal appellate judges and two tribal attorneys. Plaintiff claims that these Defendants conspired to deprive him of his right to vote and run for office in violation of § 1985 (3).

There are numerous similarities between this suit and Plaintiff's prior suit, however, Plaintiff made sufficient changes in his complaint so as to lead this Court to deny an earlier motion to dismiss filed by the Defendants. After presenting the Court with Plaintiff's deposition and accompanying exhibits, Defendants have renewed their motion to dismiss and have asked this Court to consider it a motion for summary judgment pursuant to Rule 12 (b) of the Federal Rules of Civil Procedure.

After reviewing the pleadings, the memoranda of law filed by the parties, and Plaintiff's deposition and the accompanying exhibits, it appears to this Court that there exists no material issues of fact in regard to the question of Plaintiff's right to recover under § 1985 (3). Accordingly, summary judgment will be entered in favor of the Defendants.

In order to state a claim under §1985 (3) it must be alleged that (1) the Defendants conspired, (2) for the purpose of depriving any person or class of persons of equal protection of the laws, or of equal privileges and immunities under the laws, that (3) one or more of the conspirators did or caused to be done any act in furtherance of the conspiracy, and (4) as a result, another was injured in his person or property or deprived of having and exercising any right or privilege of a citizen. Griffin v. Breckenridge, 403 U.S. 88, 102-03 (1971).

Looking at the facts presented to this Court in a light most favorable to Plaintiff, it would seem that Plaintiff has at least raised a factual issue as to whether the acts of the Defendants fell within elements 1, 3 and 4 of the Griffin test. However, in regard to element 2 of the Griffin test, there is no conceivable set of facts which could support a support a recovery for the Plaintiff.

Plaintiff's complaint alleges the following:

> Defendants' actions were motivated by an invidious discriminatory animus toward plaintiff, because of his membership in the class of people classified as "N.E." on the official B.I.A. Census rolls and his political opposition to said defendants."

The second portion of this allegation would seem to be directed toward Plaintiff's individual political beliefs. There is no allegation that he is a member of a political group opposed to defendants who are being discriminated against; such existed in Means v. Wilson, 522 F. 2d 833 (8th Cir. 1975). Clearly, the discrimination covered by § 1935 (3) must be class-based[4] and this allegation does not appear to be so. Therefore, as far as discriminatory animus against Plaintiff because of his political beliefs is concerned, no claim under § 1985 (3) is stated.

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[4] "'As we read Griffin's language, the requirement means that motivating the conspiracy there must be a discriminatory animus toward a class, not toward an individual qua individual." Carchman v. Korman Corp., 456 F. Supp. 730, 734 (E.D. Pa. 1978), aff'd 594 F. 2d 354 (3rd Cir. 1979), cert. denied 444 U.S. 898 (1979). See also Lessman v. McCormick, 591 F. 2d 605, (10th Cir. 1979); McNally v. Pulitzer Publishing Co., 532 F. 2d 69 (8th Cir. 1976); McLellan v. Mississippi Power & Light Co., 526 F. 2d 870 (5th Cir. 1976); Poirer v. Hodges, 445 F. Supp. 838 (M.D. Fla. 1978).

The class which Plaintiff alleges is being discriminated against is the so called N.E.s, non-enrolled tribal members. He claims he is being illegally denied the right to vote and run for office because he is a member of this class. The definition of a class under Griffin is not at all clear. The various courts which have considered the question have reached numerous anc conflicting results. See Note, The Scope of Section 1985 (3) since Griffin v. Breckenridge, 45 George Washington L. Rev., 39 (1977). There is no question that racially based discrimination is included within § 1985 (3). The problem arises when attempting to define "otherwise class-based, invidiously discriminatory animus." Griffin, supra, at 102.

In regard to the class question, Plaintiff primarily relies upon Means, supra, which held that supporters of a candidate for tribal president constituted a class for the purposes of § 1985 (3). In this case we have an entirely different situation.

The N.E. class is composed of Indian people who for various reasons are not enrolled as tribal members[3]. It appears that generally, over the years, the tribe has not allowed N.E.s to vote or run for office. This is the reason Plaintiff was not certified as a candidate for tribal president. Plaintiff claims that this violates § 1985 (3).

Plaintiff argues that this Court should let this case go to trial so it can be determined if the tribe can legally ex-

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[3]Apparently the reason for Plaintiff being classified as an N.E. is the tribe's belief that Plaintiff's parents were living off the reservation at the time of his birth. Plaintiff argues that he should not be classified as an N.E., but that is not an issue in this lawsuit.

clude N.E.s from participation in tribal elections. The right of an Indian tribe to determine its membership was addressed in the case of Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978). That case involved an attack upon a tribal ordinance which denied membership to childrn of female members who married outside the tribe while extending membership to children of male members who married outside the tribe. In determining not to interfere with the tribe's right to establish its own rules for membership, the Supreme Court quoted favorably from the District Court's opinion:

> To abrogate tribal decisions, particularly in the delicate area of membership, for whatever 'good' reasons, is to destroy cultural identity under the guise of saving it[4].

What we have in this case is a similar situation. Plaintiff wants this Court to interfere with a tribal decision to not permit non-enrolled tribal members to vote or run for office. The Martinez case clearly estalishes the tribe's right to decide who will be its members. Certainly, therefore, the tribe has the right to decide that it does not want non-enrolled members to vote in its elections or run for its offices. There is no question the reason Plaintiff was not certified as a candidate was because of his status as an N.E. However, in light of Martinez, it appears to

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[4]In addition to determining its own membership, it appears that Martinez would stand for the proposition that Indian tribes be given great latitude in regard to the question of eligibility to vote and run for office. Therefore, it would appear that the Martinez decision raises serious doubts as to the continued viability of the Eighth Circuit's unfortunate decision in Luxon v. Rosebud Sioux Tribe of South Dakota, 455 F. 2d 698 (8th Cir. 1972).

this Court that the actions of the tribe were not motivated by an invidiously discriminatory animus against Plaintiff because of his status as an N.E.

> The requirement that the discrimination be "class-based" is not satisfied by an allegation that there was a conspiracy which affected the interests of a class of persons similarly situated with the plaintiffs. Rather, the complaint must allege facts showing that the defendants conspired against the plaintiffs because of their membership in a class and that the criteria defining the class were invidious. Harrison v. Brooks, 519 F. 2d 1358 (1st Cir. 1975).

It appears to this Court that there are no facts which could be presented to prove that the criteria defining the N.E. class were invidious or that Plaintiff was unlawfully discriminated against because of his membership in that class. Based on the foregoing, this Court concludes that Plaintiff cannot recover under § 1985 (3) and therefore, Defendants' motion for summary judgment will be granted.

There also appears to be a serious doubt as to whether Plaintiff has exhausted his tribal remedies. However, due to the foregoing, the issue of exhaustion need not be addressed in this opinion.

BY THE COURT

ANDREW W. BOGUR, CHIEF JUDGE
UNITED STATES, DISTRICT COURT

1c

[illegible] APPLICATION
[illegible] SIOUX TRIBE
[illegible] ENROLLMENT
[illegible] DAKOTA

Pursuant to Ordinance No. 79-06 of the Oglala Sioux Tribe, adopted by the Oglala Sioux Tribal Council on June 21, 1979, application is hereby submitted for enrollment with the Oglala Sioux Tribe of Pine Ridge Indian Reservation, South Dakota for the following person:

NAME Thomas Henry Shortbull DATE OF BIRTH 12-04-46

PLACE OF BIRTH Igloo, S.D. DEGREE OF INDIAN BLOOD 15/32

TRIBE Oglala IS APPLICANT NOW OR HAS APPLICANT EVER BEEN ENROLLED

WITH ANY TRIBE OF INDIANS? YES ___ NO X. (IF YES, WHAT TRIBE? _____

CURRENT ADDRESS Box 548 DISTRICT Wakpamni

PARENTAL HISTORY

NATURAL FATHER	NATURAL MOTHER (MAIDEN NAME)
NAME Herman Everett Shortbull	NAME Elizabeth Grace Bear
DATE OF BIRTH Womble's	DATE OF BIRTH 9-1-23
PLACE OF BIRTH 3-11-18	PLACE OF BIRTH Rosebud
TRIBE Oglala NO. 10406	TRIBE Rosebud NO. 93-2
CURRENT ADDRESS Deceased - 1975	CURRENT ADDRESS 2411 3rd Ave S.E. Apt 3-5, Aberdeen

The undersigned each hereby certify on behalf of the applicant and themselves that the foregoing information is true and correct and that if any material statement is false, any enrollment granted pursuant to this application shall be void and will be of no force or effect.

Thomas Shortbull
Applicant

Subscribed and sworn to before me this ___ day of _____ 19___.

_____
Notary Public

My commission expires _____

_____
Parent of Minor

Subscribed and sworn to before me this 24 day of September 19 82.

JO ANN WHALEN NOTARY PUBLIC SOUTH DAKOTA

Jo Ann Whalen
Notary Public

My commission expires 8-17-84

This is to certify that the above application was reviewed by the Enrollment Committee and posted in accordance with Ordinance No. 79-06 and on the 28th day of Jan. 19 82 was APPROVED X; DISAPPROVED ___; TABLED ___; (listed below reason(s) for disapproval or tabled).

ENROLLMENT NO. UA5875

Chairman, Enrollment Committee

Reason(s) for Disapproval - Tabled: _____

It is the responsibility of those filing the application to furnish the necessary documents of proof establishing these statements. (See reverse side for documents needed).

You have sixty (60) days from date of receipt of notice to appeal this decision granted in Article IV of Ordinance No. 79-06, or submit additional information for reconsideration.

Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1982

THOMAS SHORTBULL,

Petitioner,

v.

STANLEY LOOKING ELK, et. al.,

Respondent,

No. 82-161

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Counsel of record and upon whom service is to be made:

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QUESTIONS PRESENTED

(Same as Petitioner)

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No. 82-161

IN THE

Supreme Court of the United States

October Term, 1982

THOMAS SHORTBULL,

Petitioner,

v.

STANLEY LOOKING ELK, et. al.*,

Respondents,

RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The respondent, Stanley Looking Elk, et. al., respectfully prays that the petition for writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on May 3, 1982, be denied.

---

*Respondents included:
Stanley Looking Elk, Elijah Whirlwind Horse*, James Mousseau, Ivan Bettelyoun, Marvin Amiotte, Gerald (Jump) Big Crow, Lyman Red Cloud, Delores Whitehead, Edgar High Whiteman, Gilbert Matthews, Dave Brewer, and Jerry Matthews.

*Deceased

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, together with the opinion of the United States District Court for the District of South Dakota, Western Division 507 F. Supp. 917 D.C.S.D. 1981 which it affirmed, appear in Appendices A and B of Petitioner's petition.

GROUNDS FOR COURT'S JURISDICTION

(Same as Petitioner)

STATUTORY PROVISIONS INVOLVED

(Same as Petitioner)

STATEMENT OF THE CASE

Petitioner was born at Igloo, South Dakota, which town is not on the Pine Ridge Reservation, South Dakota. His father is an enrolled member of the Oglala Sioux Tribe. Petitioner lived at Igloo, South Dakota with his parents until they moved to Denver, Colorado, where Petitioner attended Kindergarten. He lived on the Pine Ridge Reservation during first and second grade and then moved to Belvidere, South Dakota, a city off the Pine Ridge Reservation. He again lived at Igloo, South Dakota, with his parents from fourth grade through twelfth grade. His father and mother did not vote in Tribal elections. His father was a civilian painter at the Ordinance Department at Igloo, South Dakota.

Petitioner established his home on the Pine Ridge Reservation June 1, 1975, and has lived there ever since.

Petitioner's mother had submitted his name for enrollment at the Rosebud Sioux Tribe in 1973.

He then relinquished his right as a member of the Rosebud Sioux Tribe on March 28, 1974. His mother also submitted his application for membership in the Oglala Sioux Tribe in 1963.

The case arises out of a dispute concerning the primary and general elections for the office of Tribal President of the Oglala Sioux Tribe. Petitioner charges that a conspiracy on the part of the Respondents in violation of 42 U.S.C. § 1985 (3) led to his name not being placed on the ballot for the primary election to be held February 5, 1980. To fully understand Petitioner's allegations it is necessary to trace the facts leading up to the tribal elections.

As of April 1, 1935, the tribe established an official census of members. The Bureau of Indian Affairs has an established policy of classifying the members of the Oglala Sioux Tribe as "A" alloted (those to whom 160 acres of land were awarded pre 1935), and "U" unalloted (those that were not given land), and for those born of members but off the reservation at the time of birth and nonresidents the classification "NE". These terms have been used by the Oglala Sioux Tribe although the membership rolls have not been expanded by enrollment action on NE's until 1982 (beyond this record). The tribe's constitution provides:

> Section 1 — The membership of the Oglala Sioux Tribe shall consist as follows:
>
> (a) All persons whose names appear on the official census roll of the Oglala Sioux Tribe of the Pine Ridge Reservation as of April 1, 1935...
>
> (b) All children born to any member of the tribe who is a resident at the time of birth of said children.

In 1979 the Oglala Sioux Tribe adopted resolution 79-08 which called for the creation of a tribal enrollment committee which committee had not been established when on January 9, 1980, Petitioner Thomas Shortbull filed his nominating petitions for the office of Tribal President. [1] Even though Petitioner's petitions apparently contained a sufficient number of names to meet the tribe's requirements for a presidential candidate, the tribal election board failed to take any action in regard to Petitioner's nominating peti-

---

NOTE 1: The ordinance was implemented in 1982. The application for membership of Petitioner, along with the other NE's, was acted upon pursuant to the ordinance. Petitioner's application for membership was approved and presumably if Petitioner would run for office at this time and met all the candidacy requirements his petition for candidacy would be favorably acted upon.

tions after receipt of them. The reason for the board's refusal to certify Petitioner as a candidate was that he is not an enrolled member of the Oglala Sioux Tribe, a requirement of that office. After several tribal meetings and pleas by Petitioner that he be certified as a candidate,[2] on January 24, 1980, the Tribal Council adopted a resolution directing the tribal election board to certify Petitioner as a candidate for the upcoming tribal election. However, on January 29, 1980, a resolution was adopted by the Tribal Council which provided for the "Tribal Council body to uphold the Constitution and By Laws and Election Ordinance, and also uphold any decision of the Election Board."

On January 24, 1980, H. Clyde Red Shirt, chief judge of the Tribal Court, ordered the Election Board to certify Plaintiff as a candidate and place his name on the February 5 primary election ballot. This decision was appealed January 28, 1980, to the Tribal Appeals Court, and Judge Red Shirt's order was suspended by the Appeals Court. On February 1, 1980, irrespective of the action of the Appeals Court, Red Shirt held several tribal officials in contempt for failure to implement his order regarding the placement of the Plaintiff's name on the ballot. He ordered these officials arrested and they were placed in jail. On this same day, the Tribal Council removed Judge Red Shirt from office and Judge Delores Whitehead quashed his orders of arrest. Furthermore, the Oglala Sioux Tribal Appeals Court stayed ex-

NOTE 2: Petitioner claims the Tribal Council on January 9, 1980, passed a motion to allow NE's to vote and run for office in the Primary Election. On January 18, 1980, this action was rescinded by the council. On January 24, 1980, in response to Judge Red Shirt's order the Council took action to certify Petitioner's candidacy. On January 29, 1980, the Council finally resolved to follow the Constitution and By-Laws and "support the decisions of the election board." In the meantime Petitioner failed to appeal the decision of the appeals board as required by the election ordinance.

ecution of Red Shirt's orders of February 1, 1980. Also, on February 1, 1980, the election board notified Plaintiff that he was not eligible to run for tribal president because he was listed on the tribal records as an N.E.

On February 4, 1980, Red Shirt ruled that he was still Chief Judge and had arrest warrants re-issued for those persons he had held in contempt of court. He also ordered postponement of the February 5 primary election. On this same day, Judge Whitehead quashed Red Shirt's arrest warrants and ordered that Red Shirt's contempt citations of February 1 be purged. The primary election was held on February 5 as scheduled without Petitoner's name on the ballot.

Petitioner subsequently filed a suit in this Court on February 11, 1980. That suit, which named various tribal officials as defendants, was brought under 42 U.S.C. § 1985 (3) and 42 U.S.C. § 1983. In it Petitioner asked for damages and for the Court to declare the acts of the Respondents unlawful and to enjoin Respondents from taking such action in the future. Petitioner subsequently filed a motion for a temporary restraining order attempting to enjoin the tribal general election which was scheduled for March 11, 1980.

On March 7, 1980, the Honorable Donald J. Porter denied Petitioner's motion for a temporary restraining order and dismissed Petitioner's complaint. Judge Porter's dismissal of the complaint in the earlier case was primarily based on two factors. First, Petitioner had failed to allege that the Defendants' alleged illegal acts were carried out in order to further their own cause. Secondly, the complaint was dismissed because Petitioner had failed to show he had exhausted his tribal remedies. Petitioner filed the complaint in the instant action of March 17, 1980.

SUMMARY OF ARGUMENT (QUESTION 2)

(Respondent will follow Petitioner's order of argument.)

The tribe may discriminate against non-enrollees (N.E.'s) barring them from running for the office of tribal president without violating the standards of Griffin v. Breckenridge, 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971).

ARGUMENT (QUESTION 2)

This case does not revolve around *when* an Indian becomes a member of the Oglala Sioux Tribe, but *how*. The tribe has an official census roll of April 1, 1935. Thereafter admission to the tribal membership is by tribal action. The tribe has had an enrollment clerk and many additions to the rolls were made from 1935 to the commencement of this action. The council established a tribal enrollment committee under ordinance 79-08 for the expressed purpose of membership considerations in cases of residency questions. Petitioner admits he has made application to the tribe under this ordinance and now is a duly enrolled member. Petitioner alleges from 1935 to the commencement of this action there are others who have been born to enrolled members but have been denied enrollment to the tribe as he, and others like him, were born at a location without the boundaries of the Pine Ridge Indian Reservation, the Oglala Sioux Tribe's traditional place of residence. These persons are presumed presently dealt with as petitioner was recently dealt with. The tribe's constitution requires candidates for president of the tribe to be enrolled members. Petitioner admits he was not so qualified although he argues he is born of an enrolled member but

claims his interpretation of "residency", that of the "common law," should be adopted and imposed upon the Council of the Oglala Sioux Tribe .

The Petitioner has based his complaint against the Respondents under 42 U.S.C. § 1985 (3). Respondent's position is that 42 U.S.C. § 1985 does not apply to Indians as it does not specifically state it is applicable to Indians and in the absence of such specific statement such inference may not be implied. This Court stated in Santa Clara Pueblo v. Martinez, 98 S.Ct. 1670 (1978) the Indian Civil Rights Act does not confer jurisdiction in Federal Courts for claims of Indians against Tribal Governments, and we quote as follows:

"[1, 2] Indian tribes are "distinct, independent political communities, retaining their original natural rights" in matters of local self-government. *Worcester v. Georgia*, 6 Pet. 515, 559, 8 L.Ed. 483 (1832); see *United States v. Mazurie*, 419 U.S. 544, 557, 95 S. Ct. 710, 717, 42 L.Ed.2d 706 (1975); F. Cohen, Handbook of Federal Indian Law 122-123 (1945). Although no longer "possessed of the full attributes of sovereignty," they remain a "separate people, with the power of regulating their internal and social relations." *United States v. Kagama*, 118 U.S. 375, 381-382, 6 S.Ct. 1109, 1112-1113, 30 L.Ed. 228 (1886). See *United States v. Wheeler*, 435 U.S. 313, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978). They have power to make their own substantive law in internal matters, see *Roff v. Burney*, 168 U.S. 218, 18 S.Ct. 60, 42 L.Ed. 442 (1897) (membership); *Jones v. Meehan*, 175 U.S. 1, 29, 20 S.Ct. 1, 12, 44 L.Ed. 49 (1899) (inheritance rules); *United States v. Quiver*, 241 U.S. 602, 36 S.Ct. 699, 60 L.Ed. 1176 (1916) (domestic relations), and to enforce that law in their own forums, see *e.g.*, *Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959)."

"As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority. Thus, in *Talton v. Mayes*, 163 U.S. 376, 16 S.Ct. 986, 41 L.Ed. 196 (1896), this Court held that the Fifth Amendment did not "operat[e] upon" "the powers of local self-government enjoyed" by the tribes. *Id.*, at 384, 16 S.Ct. at 384. In ensuing years the lower federal courts have extended the holding of *Talton* to other provisions of the Bill of Rights, as well as to the Fourteenth Amendment. [7]"

7. See, *e.g.*, *Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe*, 370 F.2d 529, 533, (CA8 1967) (Due Process Clause of Fourteenth Amendment); *Native American Church v. Navajo Tribal Council*, 272 F.2d 131 (CA10 1959) (freedom of religion under First and Fourteenth Amendments); *Barta v. Oglala Sioux Tribe*, 259 F.2d 553 (CA8 1958), cert. denied, 358 U.S. 932, 79 S.Ct. 320, 3 L.Ed.2d 304 (1959) (Fourteenth Amendment). See also *Martinez v. Sourthern Ute Tribe*, 249 F.2d 915, 919 (CA10 1957), cert. denied, 356 U.S. 960, 78 S.Ct. 998, 2 L.Ed.2d 1067 (1958) (applying *Talton* to Fifth Amendment Due Process claim); *Groundhog v. Keeler*, 442 F.2d 674, 678 (CA10 1971). But see *Colliflower v. Garland*, 342 F.2d 369 (CA9 1965), and *Settler v. Yakima Tribal Court*, 419 F.2d 486 (CA9 1969), cert. denied, 398 U.S. 903, 90 S.Ct. 1690, 26 L.Ed.2d 61 (1970), both holding that where a tribal court was so pervasively regulated by a federal agency that it was in effect a federal instrumentality, a writ of habeas corpus would lie to a person detained by that court in violation of the Constitution.

The line of authority growing out of *Talton*, while exempting Indian tribes from constitutional provisions addressed specifically to State or Federal governments, of course does not relieve State and Federal Governments of their obligations to individual Indians under these provisions.

"[3] As the Court in *Talton* recognized, however, Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess. *Ibid.* See, *e.g.*, *United States v. Kagama*, *supra*, 118 U.S., at 379-381, 383-384, 6 S.Ct., at 1111-1112, 1113-1114; *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 305-307, 23 S.Ct. 115, 119, 47 L.Ed. 183 (1902). Title I of the ICRA, 25, U.S.C. §§ 1301-1303, represents an exercise of that authority. In 25 U.S.C. § 1302, Congress acted to modify the effect of *Talton* and its progeny by imposing certain restrictions upon tribal governments similar, but not identical, to those contained iin the Bill of Rights and the Fourteenth Amendment.[8] In 25 U.S.C. § 1303, the only remedial provision expressly supplied by Congress, the "privilege of the writ of habeas corpus" is made "available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe."***"

8. Section 1302 in its entirety provides that:

"No Indian tribe in exercising powers of self-government shall —

"(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;

"(2) violate the right of the people to be secure in their persons, houses, papers, and effects aginst unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

"(3) subject any person for the same offense to be twice put in jeopardy;

"(4) compel any person in any criminal case to be a witness against himself;

"(5) take any private property for a public use without just compensations;

III

[4] "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers. *Turner v. United States*, 248 U.S. 354, 358, 39 S.Ct. 109, 110, 63 L.Ed. 291 (1919); *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512-513, 60 S.Ct. 653, 656, 84 L.Ed. 894 (1940); *Puyallup Tribe, Inc. v. Washington Department of Game*, 433 U.S. 165, 172-173, 97 S.Ct. 2616, 2620-2621, 53 L.Ed.2d 667 (1977). This aspect of tribal sovereignty, like all others, is subject to the superior and plenary control of

> "(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;
>
> "(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of six months or a fine of $500, or both;
>
> "(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;
>
> "(9) pass any bill of attainder or ex post facto law; or
>
> "(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons."

Section 1301 is a definitional section, which provides, *inter alia*, that the "powers of self-government" shall include "all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed..." 25 U.S.C. § 1301(2).

Congress. But "without congressional authorization," the "Indian Nations are exempt from suit." *United States v. United States Fidelity & Guaranty Co., supra,* 309 U.S., at 512, 60 S.Ct. at 656.

It is settled that a waiver of sovereign immunity "cannot be implied but must be unequivocally expressed.' " *United States v. Testan,* 424 U.S. 392, 399, 96 S.Ct. 948, 953, 47 L.Ed.2d 114 (1976), quoting, *United States v. King,* 395 U.S. 1, 4, 89 S.Ct. 1501, 1502,, 23 L.Ed.2d 52 (1969). Nothing on the face of Title I of the ICRA purports to subject tribes to the jurisdiction of the federal courts in civil actions for injunctive or declaratory relief. *** In the absence here of any unequivocal expression of contrary intent, we conclude that suits against the tribe under the ICRA are barred by its sovereign immunity from suit."

IV

[5] "As an officer of the Pueblo, petitioner Lucario Padilla is not protected by the tribe's immunity from suit. See *Puyallup Tribe, Inc. v. Washington Department of Game, supra,* 433 U.S., at 171-172, 97 S.Ct., at 2620-2621; cf. *Ex parte Young,* 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). We must therefore determine whether the cause of action for declaratory and injunctive relief asserted here by respondents, though not expressly authorized by the statute, is nonetheless implicit in its terms."

[6] "In addressing this inquiry, we must bear in mind that providing a federal forum for issues arising under § 1302 constitutes an interference with tribal autonomy and self-government beyond that created by the change in substantive law itself. Even in matters involving commercial and domestic relations, we have recognized that "subject[ing] a dispute arising on the reservation among reservation Indians to a forum other than the one they have

established for themselves," *Fisher v. District Court*, 424 U.S. 382, 387-388, 96 S.Ct. 943, 947, 47 L.Ed.2d 106 (1976), may "undermine the authority of the tribal cour[t]...and hence...infringe on the right of the Indians to govern themselves." *Williams v. Lee*, 385 U.S., at 223, 79 S.Ct., at 272.[9] *A fortiori*, resolution in a foreign forum of intratribal disputes of a more "public" character, such as the one this case, cannot help but unsettle a tribal government's ability to maintain authority. Although Congress clearly has power to authorize civil actions against tribal officers, and has done so with respect to habeas corpus relief in §§ 1303, a proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent. Cf. *Antoine v. Washington*, 420 U.S. 194, 199-200, 95 S.Ct. 944, 948, 43 L.Ed.2d 129, (1975); *Choate v. Trapp*, 224 U.S. 665, 675, 32 S.Ct. 565, 569, 56 L.Ed. 941 (1912)."

9. In *Fisher*, we held that a state court did not have jurisdiction over an adoption proceeding in which all parties were members of an Indian tribe and residents of the reservation. Rejecting the mother's argument that denying her access to the state courts constituted an impermissible racial discrimination, we reasoned: "The exclusive jurisdiction of the Tribal Court does not derive from the race of the plaintiff but rather from the quasi-sovereign status of the Northern Cheyenne Tribe under federal law...[E]ven if a jurisdictional holding occasionally results in denying an Indian plaintiff a forum to which a non-Indian has access, such disparate treatment of the Indian is justified because it is intended to benefit the class of which he is a member by furthering the congressional policy of Indian self-government." 424 U.S., at 390-391, 96 S.Ct., at 948.

In *Williams v. Lee*, we held that a non-Indian merchant could not invoke the jurisdiction of a state court to collect a debt owed by a reservation Indian and aris-

[7] With these considerations of "Indian sovereignty...[as] a backdrop against which the applicable...federal statut[e] must be read," *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172, 93 S 1257, 1262, 36 L.Ed.2d 129 (1973), we turn now to those factors of more general relevance in determining whether a cause of action is implicit in a statute not expressly providing one. See *Cort v. Ash*, 442 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975).[10] We note at the outset that a central purpose of the ICRA and in particular of Title I was to "secur[e] for

ing out of the merchant's activities on the reservation, but instead must seek relief exclusively through tribal remedies.

10. "First, is the plaintiff 'one of the class for whose *especial* benefit the statute was enacted,' *Texas & Pacific R. Co. v. Rigsby*, 241 U.S. 33, 39, [36 S.Ct. 482, 60 L.Ed. 874] (1916) (emphasis supplied)—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? See, *e.g.*, *National Railroad Passenger Corp. v. National Assn. of Railroad Passengers*, 414 U.S. 453, 458, 460, 94 S.Ct. 690, 38 L.Ed.2d 646 (1974) (*Amtrak*). Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? See, *e.g.*, *Amtrak, supra; Securities Investor Protection Corp. v. Barbour*, 421 U.S. 512, 423, 95 S.Ct. 1733, 44 L.Ed.2d 262 (1975); *Calhoon v. Harvey*, 379 U.S. 134, 85 S.Ct. 292, 13 L.Ed.2d 190 (1964). And, finally, is the cause of action one traditionally relegated to state [or tribal] law, in an area basically the concern of the States [or tribes], so that it would be inappropriate to infer a cause of action based solely on federal law?" *Cort v. Ash*, 422 U.S., at 78, 95 S.Ct., at 2088.

See generally Note, Implication of Civil Remedies Under the Indian Civil Rights Act, 75 Mich.L.Rev. 210 (1976).

the American Indian the broad constitutional rights afforded to other Americans," and thereby to "protect individual Indians from arbitrary and unjust actions of tribal governments." S.Rep. No. 841, 90th Cong., 1st Sess., 5-6 (1967). There is thus no doubt that respondents, American Indians living on the Santa Clara Reservation, are among the class for whose especial benefit this legislation was enacted. *Texas & Pacific R. Co. v. Rigsby*, 241 U.S. 33, 39, 36 S.Ct. 482, 484, 60 L.Ed. 874 (1916); see *Cort v. Ash, supra*, 422 U.S., at 78, 95 S.Ct., at 2087. Moreover, we have frequently recognized the propriety of inferring a federal cause of action for the enforcement of civil rights, even when Congress has spoken in purely declarative terms. See, *e.g.*, *Jones V. Alfred H. Mayer Co*, 392 U.S. 409, 414 n. 13, 88 S.Ct. 2186, 2189, 20 L.Ed.2d 1189 (1968); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S.229, 238-240, 90 S.Ct. 400, 405-406, 24 L.Ed.2d 386 (1969). See also *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). These precedents, however, are simply not dispositive here. Not only are we unpersuaded that a judicially sanctioned intrusion into tribal sovereignty is required to fulfill the purposes of the ICRA, but to the contrary, the structure of the statutory scheme and the legislative history of Title I suggest that Congress' failure to provide remedies other than habeas corpus was a deliberate one. See *National Railroad Passenger Corp. v. National Assn. of Railroad Passengers*, 414 U.S. 453, 94 S.Ct. 690, 38 L.Ed.2d 646 (1974); *Cort v. Ash, supra*."

A

[8] "Two distinct and competing purposes are manifest in the provisions of the ICRA: In addition to its objective of strengthening the position of individual tribal members vis-a-vis the tribe, Congress also intended to promote the well-established federal "policy of furthering Indian self-

government." *Morton v. Mancari*, 417 U.S. 535, 551, 94 S 2483, 41 L.Ed.2d 290 (1974); see *Fisher v. District Court*, 424 U.S., at 391, 96 S.Ct. at 948.[11] This commitment to the goal of tribal self-determination is demonstrated by the provisions of Title I itself. Section 1302, rather than providing in wholesale fashion for the extension of constitutional requirements to tribal governments, as had been initially proposed,[12] selectively incorporated and in some instances modified the safeguards of the Bill of Rights to fit the unique political, cultural, and economic needs of tribal

11. One month before passage of the ICRA, President Johnson had urged its enactment as part of a legislative and administrative program with the overall goal of furthering "self-determination," "self-help," and "self-development" of Indian tribes. See 114 Cong.Rec. 5518, 5520 (1968).

12. Exploratory hearings which led to the ICRA commenced in 1961 before the Subcommittee on Constitutional Rights of the Senate Judicial Committee. In 1964, Senator Ervin, Chairman of the Subcommittee, introduced S. 3041-3048, 88th Cong., 2d Sess., on which no hearings were had. The bills were reintroduced in the 89th Congress as S. 961-968 and were the subject of extensive hearings by the Subcommittee. Hearings on S. 961-968 and S.J.Res. 40 before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 89th Cong., 1st Sess, (1965) (hereinafter cited as 1965 Hearings.)

S. 961 would have extended to tribal governments all constitutional provisions applicable to the Federal Government. After criticism of this proposal at the hearings, Congress instead adopted the approach found in a substitute bill submitted by the Interior Department, reprinted in 1965 Hearings 318 which, with some changes in wording, was enacted into law as 25 U.S.C. §§ 1302-1303. See also n. 1, *supra*.

governments.[13] See n. 8, *supra*. Thus, for example, the statute does not prohibit the establishment of religion, nor does it require jury trials in civil cases, or appointment of counsel for indigents in criminal cases, cf. *Argersinger v. Hamlin*, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972).[14]"

"The other Titles of the ICRA also manifest a congressional purpose to protect tribal sovereignty from undue in-

13. See, *e.g.*, Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, Constitutional Rights of the American Indian; Summary Report of Hearings and Investigations Pursuant to S.Res. 194, 89th Cong., 2d Sess., 8-11, 25 (Comm. Print 1966); 1965 Hearings 17, 21, 50 (statements of Solicitor of the Dept. of the Interior); *id.*, at 65 (statement of Arthur Lazarus, Jr., General Counsel for the Association of American Indian Affairs).

14. The provisions of § 1302, set forth fully in n. 8 *supra*, differ in language and in substance in many other respects from those contained in the constitutional provisions on which they were modeled. The provisions of the Second and Third Amendments, in addition to those of the Seventh Amendment, were ommitted entirely. The provision here at issue, § 1302(8), differs from the constitutional Equal Protection Clause in that it guarantees "the equal protection of *its* [the tribe's] laws," rather than of "*the* laws." Moreover, § 1302(7), which prohibits cruel or unusual punishments and excessive bails, sets an absolute limit of six months' imprisonment and a $500 fine on penalties which a tribe may impose. Finally, while most of the guarantees of the Fifth Amendment were extended to tribal actions, it is interesting to note that § 1302 does not require tribal criminal prosecutions to be intiated by grand jury indictment, which was the requirement of the Fifth Amendment specifically at issue and found inapplicable to tribes in *Talton v. Mayes*, discussed, *supra*, at 1676.

terference. For instance, Title III, 25 U.S.C. § 1321-1326, hailed by some of the ICRA's supporters as the most important part of the Act,[15] provides that States may not assume civil or criminal jurisdiction over "Indian country" without the prior consent of the tribe, thereby abrogating prior law to the contrary.[16] Other Titles of the ICRA provide for strengthening certain tribal courts through training of Indian judges,[17] and for minimizing interference by the Federal Bureau of Indian Affairs in tribal ligation.[18]"

15. See, *e.g.*, Cong.Rec. 9596 (1968) (remarks of Rep. Meeds); Hearings on H.R. 15419 before the Subcommittee on Indian Affairs of the House Committee on Interior & Insular Affairs, 90th Cong., 2d Sess., 108 (1968) (hereinafter cited as House Hearings). See also 1965 Hearings 198 (remarks of Executive Director, National Congress of American Indians).

16. In 25 U.S.C. § 1323(b), Congress expressly repealed § 7 of the Act of Aug. 15, 1953, 67 Stat. 590, which had authorized States to assume criminal and civil juridiction over reservations without tribal consent.

17. Title II of the ICRA provides, *inter alia*, "for the establishing of educational classes for the training of judges of courts of Indian offenses." 25 U.S.C. § 1311(4). Courts of Indian offenses were created by the Federal Bureau of Indian Affairs to administer criminal justice for those tribes lacking their own criminal courts. See generally W. Hagan, Indian Police and Judges 104-125 (1966).

18. Under 25 U.S.C. § 81, the Secretary of the Interior and the Commissioner of Indian Affairs are generally required to approve any contract made between a tribe and an attorney. At the exploratory hearings, see n. 12, *supra*, it became apparent that the Interior

[9] "Where Congress seeks to promote dual objectives in a single statute, courts must be more than usually hesitant to infer from its silence a cause of action that, while serving one legislative purpose, will disserve the other. Creation of a federal cause of action for the enforcement of rights created in Title I, however useful it might be in securing compliance with § 1302, plainly would be at odds with the congressional goal of protecting tribal self-government. Not only would it undermine the authority of tribal forums, see *supra,* at 1677-1678, but it would also impose serious financial burdens on already "financially disadvantaged" tribes. Subcommittee on Constitutional Rights, Senate Judiciary Committee, Constitutional Rights of the American Indian: Summary Report of Hearings and Investigations Pursuant to S.Res. 194, 89th Cong., 2d Sess., 12 (Comm. Print 1966) (hereinafter cited as Summary Report)[19]"

Department had engaged in inordinate delays in approving such contracts and had thereby hindered the tribes in defending and asserting their legal right. See, *e.g.,* Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary pursuant to S.Res.53, 87th Cong., 1st Sess., 211 (1961) (hereinafter cited as 1961 Hearings); *id.,* at 290, 341, 410. Title V of the ICRA, 25 U.S.C. § 1331, provides that the Department must act on applications for approval of attorney contracts within 90 days of their submission or the application will be deemed to have been granted.

19. The cost of civil ligation in federal district courts, in many instances located far from the reservations, doubtless exceeds that in most tribal forums. See generally 1 American Indian Policy Review Commission, Final Report 160-166 (1977); M. Price, Law and the American Indian 154-160, (1973). And, as became apparent in the congressional hearings on the ICRA, many of the poorer tribes with limited resources and income could ill afford to shoulder the burdens of

[10] "Moreover, contrary to the reasoning of the court below, implication of a federal remedy in addition to habeas corpus is not plainly required to give effect to Congress' objective of extending constitutional norms to tribal self-government. Tribal forums are available to vindicate rights created by the ICRA, and § 1302 has the substantial and intended effect of changing the law which these froums are obliged to apply.[20] Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians.[21] See, *e.g.*,

defending federal lawsuits. See, *e.g.* 1965 Hearings 131, 157; Summary Report 1679; House Hearings 69 (remarks of the Governor of the San Felipe Pueblo).

20. Prior to passage of the ICRA, Congress made detailed inquiries into the extent to which tribal constitutions incorporated "Bill of Rights" guarantees, and the degree to which the tribal provisions differed from those found in the Constitution. See, *e.g.*, 1961 Hearings 121, 166, 359; Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary pursuant to S.Res.58, 88th Cong., 1st Sess., 823 (1963). Both Senator Ervin, the ICRA's chief sponsor, and President Johnson, in urging passage of the Act, explained the need for Title I on the ground that few tribal constitutions included provisions of the Bill of Rights. See House Hearings 131 (remarks of Sen. Ervin); 114 Cong.Rec. 5520 (1968) (message from the President).

21. There are 287 tribal governments in operation in the United States, of which 117 had operating tribal courts in 1976. 1 American Indian Policy Review Commission, *supra*, n. 19, at 5, 163. In 1973 these courts handled approximately 70,000 cases. *Id.*, at 163-164. Judgments of tribal courts, as to matters properly within their jurisdiction, have been regarded in some

Fisher v. District Court, 424 U.S.____382, 96 S.Ct. 943, 47 L.Ed.2d 106 (1976); *Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959). See also *Ex parte Crow Dog*, 109 U.S. 556, 3 S.Ct. 396, 27 L.Ed. 1030 (1883). Non judicial tribal institutions have also been recognized as competent law-applying bodies. See *United States v. Mazurie*, 419 U.S. 544, 95 S.Ct. 710, 42 L.Ed.2d 706 (1975).[22] Under these circumstances, we are reluctant to disturb the balance between the dual statutory objectives which Congress apparently struck in providing only for habeas corpus relief."

B

[11] "Our reluctance is strongly reinforced by the specific legislative history underlying 25 U.S.C. § 1303. This

circumstances as entitled to full faith and credit in other courts. See, *e.g.*, *United States ex rel. Mackey v. Coxe*, 18 How. 100, 15 L.Ed. 299 (1856); *Standley v. Roberts*, 59 F. 836, 845 (CA8 1894), appeal dismissed, 17 S.Ct. 999, 41 L.Ed. 1177 (1896).

22. By the terms of its Constitution, adopted in 1935 and approved by the Secretary of the Interior in accordance with the Indian Reorganization Act of 1934,, 25 U.S.C. § 476, judicial authority in the Santa Clara Pueblo is vested in its tribal council.

Many tribal constitutions adopted pursuant to 25 U.S.C. § 476, though not that of the Santa Clara Pueblo, include provisions requiring that tribal ordinances not be given effect until the Department of the Interior gives its approval. See 1 American Indian Policy Review Commission, *supra* n. 19, at 187-188; 1961 Hearings 95. In these instances, persons aggrieved by tribal laws may, in addition to pursuing tribal remedies, be able to seek relief from the Department of the Interior.

history, extending over more than three years,[23] indicates that Congress' provision for habeas corpus relief, and nothing more, reflected a considered accommodation of the competing goals of "preventing injustices perpetrated by tribal governments, on the one hand, and, on the other, avoiding undue or precipitious interference in the affairs of the Indian people." Summary Report 11."

"In settling on habeas corpus as the exclusive means for federal-court review of tribal criminal proceedings, Congress opted for a less intrusive review mechanism than had been initially proposed. Originally, the legislation would have authorized *de novo* review in federal court of all convictions obtained in tribal courts.[24] At hearings held on the proposed legislation in 1965, however, it became clear that even those in agreement with the general thrust of the review provision — to provide some form of judicial review of criminal proceedings in tribal courts — believed that *de novo* review would impose unmanageable financial burdens on tribal governments and needlessly displace tribal courts. See *id.*, at 12; 1965 Hearings 22-23, 157, 162, 341-342. Moreover, tribal representatives argued that *de novo* review would "deprive the tribal court of all jurisdiction in the event of an appeal, thus having a harmful effect upon law enforcement within the reservation," and urged instead that "decisions of tribal courts... be reviewed in the U.S. district courts upon petition for a writ of habeas corpus." *Id.*, at 79. After considering numerous alternatives for review of tribal convictions, Congress apparently decided

23. See n. 12, *supra*. Although extensive hearings on the ICRA were held in the Senate, see *ibid.*, House consideration was extremely abbreviated. See House Hearings, *supra*; 114 Cong.Rec. 9614-9615 (1968) (remarks of Rep. Aspinall).

24. S. 692, 89th Cong., 1st Sess. (1965), reprinted in 1965 Hearings 6-7. See n. 12, *supra*.

that review by way of habeas corpus would adequately protect the individual interests at stake while avoiding unnecessary intrusions on tribal governments."

"Similarly, and of more direct import the issue in this case, Congress considered and rejected proposals for federal review of alleged violations of the Act arising in a civil context. As initially introduced, the Act would have required the Attorney General to "receive and investigate" complaints relating to deprivations of an Indian's statutory or constitutional rights, and to bring "such criminal or other action as he deems appropriate to vindicate and secure such right to such Indian."[25] Not withstanding the screening effect this proposal would have had on frivolous or vexatious lawsuits, it was bitterly opposed by several tribes. The Crow Tribe representative stated:

> This [bill] would in effect subject the tribal sovereignty of self-government to the Federal government...[B]y its broad terms [it] would allow the Attorney General to bring any kind of action as he deems appropriate. By this bill, any time a member of the tribe would not be satisfied with an action by the [tribal] council, it would allow them [*sic*] to file a complaint with the Attorney General and subject the tribe to a multitude of investigations and threat of court action." 1965 Hearings 235 (statement of Mr. Real Bird)."

"In a similar vein, the Mescalero Apache Tribal Council argued that "[i]f the perpetually dissatisfied individual Indian were to be armed with legislation such as proposed in [this bill] he could disrupt the whole of tribal government." *Id.*, at 343. In response, this provision for suit by the

25. S. 963, 89th Cong., 1st Sess. (1965). See n. 12, *supra*.

Attorney General was completely eliminated from the ICRA. At the same time, Congress rejected a substitute proposed by the Interior Department that would have authorized the Department to adjudicate civil complaints concerning tribal actions, with review in the district courts available from final decisions of the agency.[26]"

"__Given this history, it is highly unlikely that Congress would have intended a private cause of action for injunctive and declaratory relief to be available in the federal courts to secure enforcement of § 1302. Although the only Committee Report on the ICRA in its final form, S.Rep. No. 841,

26. The Interior Department substitute, reprinted in 1965 Hearings 318, provided in relevant part:

"Any action, other than a criminal action, taken by an Indian tribal government which deprives any American Indian of a right or freedom and protected by this Act may be reviewd by the Secretary of the Interior upon his own motion or upon the request of said Indian. If the Secretary determines that said Indian has been deprived of any such right or freedom, he shall require the Indian tribal government to take such corrective action as he deems necessary. Any final decision of the Secretary may be reviewed by the United States district court in the district in which the action arose and such court shall have jurisdiction thereof.

In urging Congress to adopt this proposal, the Solicitor of Interior specifically suggested that "Congress has the power to give to the courts the jurisdiction that they would require to review the actions of an Indian tribal court," and that the substitute bill which the Department proposed "would actually confer on the district courts the jurisdiction they require to consider these problems." *Id.*, 23-24. Congress' failure to adopt this provision is noteworthy particularly because it did adopt the other portion of the Interior substitute bill, which led to the current version of §§ 1302 and 1303. See n. 12, *supra*.

90th Cong. 1st Sess. (1967), sheds little additional light on this question, it would hardly support a contrary conclusion.[27] Indeed its description of the purpose of Title I,[28] as

27. Respondents rely most heavily on a rambling passage in the Report discussing *Talton v. Mayes* and its progeny, see n. 7, *supra*, some of which arose in a civil context. S.Rep. No. 841, at 8-11. Although there is some language suggesting Congress was concerned about the unavailability of relief in federal court, the Report nowhere states that Title I would be enforceable in a cause of action for declaratory or injunctive relief, and the cited passage is fully consistent with the conclusion that Congress intended only to modify the substance of the law applicable to Indian tribes, and to allow enforcement in federal court through habeas corpus. The Report itself characterized the import of its discussion as follows:

"These cases illustrate the continued denial of specific constitutional guarantees to litigants in tribal court proceedings, on the ground that the tribal courts are quasi-sovereign entities to which general provisions in the Constitution do not apply." *Id.*, at 10.

28. The Report states: "The purpose of Title I is to protect individual Indians from arbitrary and unjust actions by tribal governments. This is accomplished by placing certain limitations on an Indian tribe in the exercise of its powers of self-government." *Id.*, at 6. It explains further that "[i]t is hoped that Title II [25 U.S.C. § 1311], requiring the Secretary of the Interior to recommend a model code [to govern the adminstration of justice] for all Indian tribes, will implement the effect of Title I." *Ibid.*, (Although § 1311 by its terms refers only to courts of Indian offenses, see n. 17, *supra*, the Senate Report make clear that the code is intended to serve as a model for use in all tribal courts. S.Rep. No. 841, *supra*, at 6, 11.) Thus, it appears that the Committee viewed § 1302 as enforceable only on habeas corpus and in tribal forums.

well as the floor debates on the bill,[29] indicates that the ICRA was generally understood to authorize federal judicial review of tribal actions only through the habeas corpus provisions of § 1303.[30] These factors, together with Congress' rejection of proposals that clearly would have authorized causes of action other than habeas corpus, persuade us that Congress, aware of the intrusive effect of federal judicial review upon tribal self-government, intended to create only a limited mechanism for such review, namely, that provided for expressly in § 1303."

29. Senator Ervin described the model code provisions of Title II, see n. 28, *supra*, as "the proper vehicle by which the objectives" of Title I should be achieved. 113 Cong.Rec. 13475 (1967). And Congressman Reifel, one of the ICRA's chief supporters in the House, explained that "by providing for a writ of habeas corpus from the Federal court, the bill would assure effective enforcement of these fundamental rights." 114 Cong.Rec. 9553 (1968).

30. Only a few tribes had an opportunity to comment on the ICRA in its final form, since the House held only one day of hearings on the legislation. See n. 23, *supra*. The Pueblos of New Mexico, testifying in opposition to the provisions of Title I, argued that the habeas corpus provision of § 1303 "opens an avenue through which Federal courts, lacking knowledge of our traditional values, customs, and laws, could review and offset the decisions of our tribal councils." House Hearings 37. It is inconceivable that, had they understood the bill impliedly to authorize other actions, they would have remained silent, as they did, concerning this possibility. It would hardly be consistent with "[t]he overriding duty of our Federal Government to deal fairly with Indians," *Morton v. Ruiz*, 415 U.S. 199, 236, 94 S.Ct. 1055, 1075, 39 L.Ed.2d 270 (1974), lightly to imply a cause of action on which the tribes had no prior opportunity to present their views.

V

[12] "As the bill's chief sponsor, Senator Ervin, [31] commented in urging its passage, the ICRA "should not be considered as the final solution to the many serious constitutional problems facing the American Indian." 113 Cong.Rec. 13473 (1967). Although Congress explored the extent to which tribes were adhering to constitutional norms in both civil and criminal contexts, its legislative investigation revealed that the most serious abuses of tribal power had occurred in the administration of criminal justice. See *ibid.*, quoting Summary Report 24. In light of this finding, and given Congress' desire not to intrude needlessly on tribal self-government, it is not surprising that Congress chose at this stage to provide for federal review only in habeas corpus proceedings."

"By not exposing tribal officials to the full array of federal remedies available to redress actions of federal and state officials, Congress may also have considered that resolution of statutory issues under § 1302, and particulary those issues likely to arise in a civil context, will frequently depend on questions of tribal tradition and custom which tribal forums may be in a better position to evaluate than federal courts. Our relations with the Indian tribes have "always been...anomalous...and of a complex character." *United States v. Kagama*, 118 U.S., at 381, 6 S.Ct., at 1112. Although we early rejected the notion that Indian tribes are "foreign states" for jurisdictional purposes under Art. III, *Cherokee Nation v. Georgia*, 5 Pet. 1, 8 L.Ed. 25 (1831), we have also recognized that the tribes remain quasi-sovereign nations which, by government structure, culture, and source of sovereignty are in many ways foreign to the constitutional institutions of the federal and

31. See generally Burnett, An Historical Analysis of the 1968 "Indian Civil Rights" Act, 9 Harv.J.Legis. 557, 574-602, 603 (1972).

state governments. See *Elk v. Wilkins*, 112 U.S. 94, 5 S.Ct. 41, 28 L.Ed. 643, (1884). As is suggested by the District Court's opinion in this case, see *supra*, at 1674-1675, efforts by the federal judiciary to apply the statutory prohibitions of § 1302 in a civil context may substantially interfere with a tribe's ability to maintain itself as a culturally and politically distinct entity.[32]"

[13] "As we have repeatedly emphasized, Congress' authority over Indian matters is extraordinarily broad, and the role of courts in adjusting relations between and among tribes and their members correspondingly restrained. See *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565, 23 S.Ct. 216, 221, 47 L.Ed. 299 (1903). Congress retains authority expressly to authorize civil actions for injunctive or other relief to redress violations of § 1302, in the event that the tribes themselves prove deficient in applying and enforcing its substantive provisions. But unless and until Congress makes clear its intention to permit the additional intrusion on tribal sovereignty that adjudication of such actions in a federal forum would represent, we are constrained to find that § 1302 does not impliedly authorize actions for declaratory or injunctive relief against either the tribe or its officers."

32. A tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community. See *Roff v. Burney*, 168 U.S. 218, 18 S.Ct. 60, 42 L.Ed. 442 (1897); *Cherokee Intermarriage Cases*, 203 U.S. 76, 27 S.Ct. 29, 51 L.Ed. 96 (1906). Given the often vast gulf between tribal traditions and those with which federal courts are more intimately familiar, the judiciary should not rush to create causes of action that would intrude on these delicate matters.

Since there is no reference in 42 U.S.C. § 1985 (3) to Indians under the interpretive rules of this court or expressed in Santa Clara Pueblo v. Martinez, supra, it follows 42 U.S.C. § 1985 (3) does not rest jurisdiction in the federal district courts to hear complaints of Indians vs. Indians.

For the purpose of addressing the Petitioner's arguments, even if 42 U.S.C. § 1985 (3) were found applicable in this case, which interpretation Respondent denies, the argument of Petitioner fails as Petitioner cannot satisfy the requirements laid down in the case Griffin v. Breckenridge, 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971). The lower court found NE's (non-enrolled) is not a class and therefore could not present a class based claim.

The decision herein appealed from refers to cases interpreting the Griffin decision;

Great American Federal Savings and Loan Association vs. Novotny, 442 U.S. 366, 389, 6, 99 S.Ct. 2345, 60 L.Ed.2d 957 (1959).

The Class Based Answers of 42 U.S.C. § 1985 (c): A Suggested Approach, 64, Minnesota L.Rev. 635, 642-44 (1980).

Ward v. Connor 657 F. 2d 45 (4th Cir. 1981)

Marlowe v. Fisher Body 489 F. 2d 1057 (6th Cir. 1973)

Action v. Gannon 450 F. 2d 1227 (8th Cir. 1971)

Baer v. Baer 450 F. Supp. 481 (N.D. Cal. 1978)

Philadelphia Yearly Meeting of the Religious Society of Friends v. Tate, 519 F. 2d 1335, (3rd Cir. 1975)

Glasgow v. City of Louisville, 528 F.2d 899, (6th Cir.), cert. denied, 423 U.S. 930, 96 S.Ct. 280, 46 L.Ed.2d 258 (1975).

Cameron v. Brock 473 F.2d 608 (6th Cir. 1973)

Puentes v. Sullivan 425 F. Supp. 249 (W.D. Tex. 1977)

Harrison v. Brooks 519 F. 2d 1358, 1359-60 (1st Cir. 1975)

and distinguished this case from Means v. Wilson, 522 F.2d 833 (8th Cir. 1975), cert. denied in 424 U.S. 958, 96 S.Ct. 1456, on the basis that NE's as they appear in this case, do not present a "class based claim." The court held "class based animus" does not include personal animus:

Duff v. Sherlock 432 F. Supp. 423, 429 (E.D. Pa. 1977)

Lesonan v. McCormick, 591 F.2d 605, 608 (10th Cir.) 1979.

McNally v. Pulitzer Publishing Co., 532 F.2d 69, 75 (8th Cir.), cert. denied, 429 U.S. 855, 97 S.Ct. 150, 50 L.Ed.2d 131 (1976).

McLellan v. Mississippi Power & Light Co., 545 F.2d 919 (5th Cir. 1977).

Oarchman v. Korman Corp., 456 F. Supp. 730, 734 (E.D. Pa. 1978), cert. denied, 444 U.S. 898, 100 S.Ct. 205, 62 L.Ed.2d 133 (1979).

then the court follows Santa Clara Pueblo v. Martinez, supra, in holding a tribe has an important interest in setting the standards for who may vote and run in tribal elections. An Indian becomes an enrolled member of the tribe upon admittance by the tribe to the list of enrolled members.

SUMMARY OF ARGUMENT (QUESTION I)

Under the doctrine of Santa Clara Pueblo v. Martinez, supra, there is no real basis in this court for a complaint against the officers and employees of the tribe and on the record before the court there is no factual basis.

ARGUMENT (QUESTION 1)

Santa Clara Pueblo v. Martinez, supra, held the federal court did not have jurisdiction to hear an action of an Indian vs. an Indian official in his individual capacity. One of the defendants was Lucario Padilla and the court concluded on page 1684 the action would not be against the tribe or its officers. Even if 42 U.S.C. § 1985 (3) afforded Petitioner a forum for an action against Respondents, which Respondent does not concede, Petitioner's petition must be denied for the reasons held in a similar suit in Chose v. McMasters, 573 F.2d 1011 (1978):

> "Local executive or administrative officials are accorded a qualified, good faith immunity from liability in damages under 42 U.S.C. § 1983. See *Wood v. Strickland*, 420 U.S. 308, 322, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975); *Williams v. Anderson*, 562 F.2d 1081, 1101, (8th Cir. 1977); *Curry v. Gillette*, 461 F.2d 1003,1005 (6th Cir.)*cert. denied*, 409 U.S. 1042, 93 S.Ct. 529, 34 L.Ed.2d 492 (1972); *Oberhelman v. Schultze*, 371 F. Supp. 1089, 1090 (D. Minn.), *aff'd mem.*, 505 F.2d 736 (8th Cir. 1974). Accordingly, the defendants herein are liable only if (1) they knew, or reasonably should have known, that their actions violated Chose's clearly established constitutional rights or (2) they took the action with malicious or impermissible motives of causing a deprivation of constitutional rights or other injury to Chose. *Wood v. Strickland, supra* at 322, 95 S. Ct. 992; *Williams v. Anderson, supra* 562 F. 2d at 1101."

Shortbull has the burden of proof to show the Respondents knew their actions would violate Petitioner's constitutional rights and further that their acts were motivated to cause a deprivation of rights to Petitioner. Petitioner's explanation of the acts of Respondents and

their motives is found in the transcript of Petitioner's Deposition of December 11, 1980, where he admits he is unable to sustain such a burden of proof as follows:

(a) Terry Matthews, pg. 69, 70, 71
(b) Marvin Amiotte, pg. 71, 72
(c) Dave Brewer, pg. 73
(d) Deloris Whitehead, pg. 74, 75
(e) Lyman Red Cloud, pg. 92
(f) Gerald Jump Big Crow, pg. 93, 94, 95, 96
(g) Ivan Bettelyoun, pg. 96, 97
(h) James Mousseau, pg. 97, 98
(i) Elijah Whirlwind Horse, pg. 97
(j) Stanley Looking Elk
(k) Edgar High Whiteman, pg. 72
(l) Gilbert Matthews, pg. 72

Therefore, there is neither a legal or factual basis for Petitioner's action.

CONCLUSION

The Petition for Writ of Certiorari of Thomas Shortbull must be denied and the decision of the Eighth Court sustained.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1982

THOMAS SHORTBULL,

Petitioner,

v.

STANLEY LOOKING ELK, et al.,

Respondent,

No. 82-161

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONER'S REPLY

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONER'S REPLY

This is petitioner's reply brief to Respondent's Opposition brief to the petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit which was docketed in this Court on July 29, 1982. Respondent's opposition brief was served on petitioner on September 10, 1982 after an extension for filing.

ARGUMENTS IN RESPONDENT'S BRIEF

Respondents have raised three arguments in their opposition brief which the petitioner will respond seperately to in this reply brief. The arguments are: (1) petitioner did not meet the requirements of a class based animus under 42 U.S.C. 1985 (3) as the Tribal Constitution requires a person to be enrolled to run for tribal office; (2) this conspiracy statute requires that the burden of proof is with the plaintiff when it involves public officials; and (3) Indians are excluded from federal court relief under 42 U.S.C. 1985 (3).

ARGUMENT 1

The District Court and the Eight Circuit Court of Appeals ruled against petitioner's meeting the class based animus under 42 U.S.C. 1985 (3) because of his classification as an NE (not enrolled), and the tribes right to determine its own membership. However, pet-

itioner argued that the NE classification was indeed an invidious classification in pages 12-15 in his writ for certiorari. Additionally, petitioner maintains that is membership began when he was born when he met the Tribal Constitutional provision for membership which states that a child of an enrolled member is a member of the Oglala Tribe under this provision:

> Article II. Section (b) All children born to any member of the Tribe who is a resident of the reservation at the time of birth of said child.

Petitioner's postion that he was a member of the Tribe was substantiated by his June 28, 1982 enrollment with no enrollment amendment to the Tribal Constitution since its adoption in 1935.

Although the petitioner was certified as a candidate for Tribal President and NEs were allowed the right to vote in the 1980 election, respondents submit in their opposition brief on page 7 that their actions were legitimate based on the Tribal Constitution's requirement that a person must be an enrolled member to run for Tribal Office.

Firstly, petitioner questions the propriety of respondents making a statement such as this when there is not one place in the Tribal Constitution in which there is reference to membership requring an enrollment or enrollment being necessary to run for office or to vote in tribal elections. The only applicable provisions in the Tribal Constitution that deal with the right to run for office and vote in Tribal elections are Article VII-Elections and Article II of the By-Laws- Qualifications of Officers.

Article VII-Elections

> Section 1. All members of the Tribe, 21 years or over, who have resided on the reservation for a period of one year immediately prior to any election shall have the right to vote.

Article II-QUALIFICATIONS OF OFFICERS

> Section 1. Any person elected as councilman must be a member of the Oglala Sioux Tribe and must be at least 25 years of age at the time of the election

Other than these two constitutional provisions,

there are no other statements in the Tribal Constitution which deal with tribal membership, the right to run for tribal office, or the right to vote in tribal election. Therefore, respondents are attempting to mislead this Court that the Tribal Constitution allows for only those who are tribally enrolled to qualify for their tribal rights. As the Tribal Constitution only refers to members not tribally enrolled members as the basis for tribal rights, petitioner reinterates his position as found in page 13 of his writ that his membership began with his birth as this is when he met the constitutional requirements of tribal membership.

As Article III Section 10 of the Tribal Constitution provides that the Tribal Council shall be the sole judge of the constitutional qualifications of its members, petitioner maintained throughout his pleadings to the Tribal Council that the Council had the authority to certify him as a candidate for Tribal President.

On January 24, 1980, the Tribal Council passed a resolution that certified petitioner as a candidate for Tribal President and NEs were allowed to vote in the 1980 election. As this resolution was never rescinded by the Tribal Council, this was the law of the Oglala Tribe. However, when respondents refused to implement this legal authority of the Tribe, this action created the exact class based animus as required in 42 U.S. C. 1985 (3) for petitioner and the NEs were a class who were deprived of their right to run for office and vote even though they were in fact legal participants in the 1980 election and by this action were deprived of their civil rights.

Petitioner would also like the Court to consider that on Indian reservations there are no political parties in tribal elections, and nothing that resembles party affliliation in a Tribal Election. It is petitioner's position that if the NEs were allowed to vote in the 1980

Primary Election that petitioner would have received many of the NE votes for he had fought for their right to vote in the Tribal election before the Tribal Council. Therefore, the denial of the NE participation was motivated by political considerations.

ARGUMENT 2

Respondents submit the case of Chase v McMasters, 573 F. 2d 1011 (1978) on the position that public officials are liable under 42 U.S.C. 1985 (3) only if (1) they knew or reasonably should have known, that their actions violated Chase's clearly established constitutional rights or (2) they took the action with malicious or impermissable motives of causing a deprivation of rights or other injury to Chase. Respondents state in their brief that "Shortbull has the burden of proof to show the Respondents knew their actions would violate Petitioner's constitutional Rights and further that their acts were motivated to cause a deprivation of rights

to Petitioner". However, under this case, it only requires that one of the two requirements of liablility must be met to state an action under 42 U.S.C. 1985 (3). Under Chase v McMasters, it is petitioner's position that respondents knew that their actions violated the clearly established rights of petitioner, and it is under this requirement that petitioner maintains respondents violated his and the other NEs civil rights.

Respondents submit that the Petitioner's Deposition of December 11, 1980 does not meet the requirements of liability under 42 U.S.C. 1985 (3) for he is unable to sustain such a burden of proof. Peitiioner disagrees for respondents were bound by their oaths of office to implement the laws of their Tribe, and when the Tribal Council certified petitioner as a a candidate for Tribal Presidents and NEs were allowed to vote in the 1980 election, the respondents had no discretionary authority to not

implement these laws unless the Tribal Council authority was rescinded which never happened. Therefore, respondents knowingly refused to implement the laws of the Oglala Tribe.

Additionally, in every instance that respondents provide instances of where proof was not met in Petitioner's deposition, the record will show repeatedly that petitioner maintained that the illegal conspiracy under 42 U.S.C. 1985 (3) centered around respondents not implementing the January 24the Council action which was the legal authority they were bound by.

As stated in petitioner's writ, the fault with this case may have been in a better prepared complaint. However, in Means v Wilson 522 F. 2d 833, the Eighth Circuit held "the complaint alleges all of these facts on one way or another no matter how inarfully done and states a claim under 42 U.S.C. 1985 (3)

ARGUMENT 3

Respondents argue that since there is no spe-

cific reference to Indians under 42 U.S.C. 1985 (3), that this statute does not rest jurisdiction in the federal courts to hear complaints of Indians vs Indians. Additionally, respondents argue that Santa Clara v Martinez, 436 U.S. 49 (1978) excludes Indians from all federal court relief involving Indians vs Indians.

Firstly, Indians are citizens of the United States, and as such enjoy the equal protection of federal laws unless a court decision has ruled that the particular statute is not applicable based on precedents in Indian law. As for the Eighth Circuit in which this case originated, the Court of Appeals has held that tribal members are entitled to the protection under 42 U.S.C. 1985 (3) in the case of Means v Wilson,522 F. 2d 833. Therefore, until Means v Wilson is overturned, it is still the applicable law in this case.

As for whether the Martinez decision excludes all federal court relief for tribal members,

petitioner's argument against this is found in pages 16-20 of petitioner's writ for certiorari.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the petition, a writ of certiorari should be granted.

Respectfuly submitted,
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PRO SE